(1)

No. 92-6033-CFX Title: William McNeil, Petitioner
Status: GRANTED v.
United States

Docketed: September 21, 1992 Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Shoenberger,Allen E.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 21 1992	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Oct 26 1992		Order extending time to file response to petition until November 25, 1992.
5	Nov 24 1992		Brief of respondent United States in opposition filed.
6	Dec 3 1992		DISTRIBUTED. January 8, 1993
8	Jan 11 1993		REDISTRIBUTED. January 15, 1993
10	Jan 15 1993		Petition GRANTED. The brief of the petitioner must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., March 1, 1993. The brief of the respondent must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., March 31, 1993. A reply brief, if any, must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., April 12, 1993. Rule 29 does not apply. The case is set for oral argument during the Session beginning April 19, 1993.
			**********
11	Jan 21 1993	G	Motion of petitioner for appointment of counsel filed.
12	Jan 27 1993		REDISTRIBUTED. February 19, 1993
13	Feb 22 1993		Motion for appointment of counsel GRANTED and it is ordered that Allen E. Shoenberger, Esquire, of Chicago, Illinois, is appointed to serve as counsel for the petitioner in this case.
16	Feb 24 1993		Joint appendix filed.
20	Feb 25 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Seventh Circuit.
17	Mar 1 1993		Brief of petitioner William McNeil filed.
19	Mar 1 1993		Brief amicus curiae of Trial Lawyers for Public Justice filed.
21	Mar 3 1993		Record filed.
		*	Original proceedings United States District Court for the Northern District of Illinois.
18	Mar 5 1993		SET FOR ARGUMENT MONDAY, APRIL 19, 1992. (2RD CASE).
22	Mar 10 1993		CIRCULATED.
23	Mar 31 1993	G	Motion of the Acting Solicitor General to permit William K. Kelley, Esquire, to present oral argument pro hac vice filed.
24	Mar 31 1993	X	Brief of respondent United States filed.
25	Apr 5 1993		Motion of the Acting Solicitor General to permit William K. Kelley, Esquire, to present oral argument pro hac

No. 92-6033-CFX

Entry	Date	Note	Proceedings and Orders
			vice GRANTED.
27	Apr 8 1993	X	Reply brief of petitioner filed.
28	Apr 19 1993		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

92-6033

In the United States
Supreme Court

Supreme Court, U.S.
FILED
SEP 21 1992
OFFICE OF THE CLERK

October Term 1992

No. _____

ORIGINAL

William McNeil,
Petitioner

v.

The United States of America,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the
Seventh Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES PETITIONER, WILLIAM MCNEIL AND PETITIONS THIS COURT FOR PERMISSION TO PROCEED IN FORMA PAUPERIS AND THROUGH HIS ATTORNEY STATES AS FOLLOWS:

1. That counsel was appointed by the United States Court of Apppeals for the Seventh Circuit and leave was granted by the United States District Court to appeal in forma pauperis to the United States Court of Appeals for the Seventh Circuit.

2. Leave was sought to proceed in forma pauperis in the United States District Court as well as appointment of counsel. Both the initial motion to proceed in forma pauperis and the motion for appointment of counsel were denied in the District Court.

3. Petitioner remains in custody and his poverty status is unchanged.

4. Counsel has prepared an affidavit in the form proscribed under this court Rule 39 and has requested that said affidavit be executed by Mr. McNeil and sent directly to this court by MrMcNeil.

Allen E. Shoenberger
Court Appointed Counsel
1 E. Pearson Street
Chicago, Illinois 60611

312 915 7141

Affidavit

I certify under penalty of perjury that the foregoing is true and correct. Executed on September 18, 1992.

Allen E. Shoenberger

Subscribed to and sworn to before me this
18th day of September, 1992.

OFFICIAL SEAL
KAREN V. KOLE
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. JULY 18,1994

notary public

Allen E. Shoenberger
Court Appointed Counsel*
Loyola Law School
One East Pearson Street
Chicago, Illinois 60611
312 915 7141

*Counsel of Record

In the United States
Supreme Court

October Term 1992

No. _____

William McNeil,
Petitioner

v.

The United States of America,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I, Willaim McNeil, being first duly sworn, depose and say that I am the Petitionr in the above titled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security threfore; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

The issue as stated in the Petition for Certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? no

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of you last employment and the amount of salary or wages per month which you received.

Oct. 1981 about 1900 per month

2. Have you received within the past twelve months any income

 no

from a business, profession or other form of self employment, or in the form of rent payments, interest dividends or other source? no

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? no

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? no

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

signature: William McNeil
Willaim McNeil

SUBSCRIBED AND SWORN TO BEFORE ME THIS 22 DAY OF September, 1992.

Curtis K. Brady
notary public

" OFFICIAL SEAL "
CURTIS K. BRADY
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXPIRES 10/23/95

Allen E.Shoenberger
Court Appointed Counsel
1 E. Pearson Street
Chicago,Illinois 60611
312 915 7141

92-6033

In the United States
Supreme Court

October Term 1992

No. _____

William McNeil,
Petitioner

v.

The United States of America,
Respondent

ORIGINAL

Petition for Writ of Certiorari
to the United States Court of Appeals
for the
Seventh Circuit

Allen E. Shoenberger
Court Appointed Counsel*
Loyola Law School
One East Pearson Street
Chicago, Illinois 60611
312 915 7141

*Counsel of Record

QUESTION PRESENTED

Whether an incomplete filing of a Federal Tort Claims Act suit may be perfected by filing a notice of final agency denial of the claim prior to substantial progress on the merits?

Parties

The caption contains the names of all the parties below.

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In the United States Supreme Court
October Term 1992

William McNeil,
Petitioner,

v.
The United States of America,
Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the
Seventh Circuit

Petitioner, William McNeil, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Opinions below

The unreported opinion and judgment of the United States District Court of the Northern District of Illinois, William McNeil v. United States Public Health Service, No. 89 C 1822 dismissing the case on January 24, 1991 is reproduced in Appendix A.

The opinion of the United States Court of Appeals for the Seventh Circuit in William McNeil v. United States of America (one Judge dissenting) is reported at 964 F.2d 647 (7th Cir. 1992) and is reproduced in Appendix B along with the judgment.

The order of the United States Court of Appeals for the Seventh Circuit of June 26, 1992 denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc is reproduced in Appendix B.

Statement of Jurisdiction

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of the case was filed on May 20, 1992, and amended May 26, 1992. (with Judge Ripple dissenting)

Petitioner's subsequent Motion for Rehearing and Suggestion for Rehearing en Banc was denied by the United States Court of Appeals for the Seventh Circuit on June 26, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

Statutory Provisions Involved

The Federal Tort Claims Act, 28 U.S.C. section 2401 (b) reads:

"A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

The Federal Tort Claims Act, 28 U.S.C. section 2765 reads:

2675. Disposition by federal agency as prerequisite; evidence

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages."

STATEMENT OF THE CASE

On March 6, 1989 Mr. McNeil, a state prisoner in Stateville Correctional Center, Joliet, Illinois, filed suit in the United States District Court for the Northern District of Illinois. In that suit Mr. McNeil alleged that agents of the federal government conducted

AIDS and Hepatitis B experiments upon Mr. McNeil without his consent. Mr. McNeil alleged that these experiments resulted in his contracting hepatitis.

Mr. McNeil received no response to his March 6, 1989 filing which filing was lost in the "crush of prisoner litigation."

On January 17, 1989 Mr. McNeil had sent a letter to the Department of Health and Human Services demanding a sum certain. On January 24, 1989 the Chief Counsel for the Department informed Mr. McNeil that his letter would be forwarded to a Public Health Services claims officer.

On July 7, 1989 Mr. McNeil filed another claim about the same subject in the Department of Health and Human Services. This claim was denied on July 21, 1989.

On August 7, 1989 Mr McNeil filed an affidavit-letter in support of his earlier motion for appointment of counsel (which motion was eventually denied - Mr. Mc Neil was pro se in the District Court). Attached to that affidavit was a copy of the sum certain denial of July 21, 1989. Mr. McNeil's affidavit included the following statement:

"However, under the circumstances that exist here at Stateville Correctional Center, its clearly impossible to file proper motions: therefore, plaintiff prays this Honorable Court accepts this letter as a proper request, whereas plaintiff can properly commence his legal action accordingly."

On September 19, 1990 the Government moved to dismiss alleging that the suit was barred under 28 U.S.C. Section 2401(b).

On January 24, 1991, the District Court granted the government's motion to dismiss, finding that the suit had been filed on March 6, 1989, and thereby had not complied strictly with the Federal Tort Claims Act in that the sum certain denial had not been received prior to filing suit.

This finding was affirmed by the United States Court of Appeals for the Seventh Circuit in its judgment and opinion of May 20, 1992 in part on the basis of this court's decision regarding an analogous filing requirement for environmental laws, Hallstrom v. Tillamook County, 493 U.S. 20 (1989).

A Petition for Rehearing with Suggestion for Rehearing En Banc was filed on May 28, 1992 and is reproduced in Appendix C.

Said Petition suggested inter alia that neither counsel for the government nor Petitioner were aware of Hallstrom v. Tillamook County, and thus that neither had given the Seventh Circuit the benefit of their analysis. The Petition suggested that the legislative history of the Federal Tort Claims Act was considerably different from that of the environmental statutes involved in Hallstrom v. Tillamook County and that this court's decision in Hallstrom v. Tillamook County did not bar petitioners from any access to judicial relief. The Opinion of the United States Court of Appeals for the Seventh Circuit stated that "[i]t is too late" for Mr. McNeil "to file another [case]."

That Petition for Rehearing was denied June 26, 1992.

REASONS FOR GRANTING THE WRIT

This case presents an important and unsettled question

regarding the procedural prerequisite for filing suit under the Federal Tort Claims Act, 28 U.S.C. Section 2675, and gives this court an opportunity to resolve a conflict between the Circuits.

The decision of the United States Court of Appeals in this case added to the conflict between various United States Court of Appeals for various Circuits. The third and eighth circuits, Kubrick v. United States, 581 F.2d 1092 (3rd Cir. 1978), rev'd on other grounds, 444 U.S. 111 (1979), and Celestine v. Veterans Administration, 746 F.2d 1360 (8th Cir. 1984) permit a Federal Tort Claims action to go forward if prematurely filed so long as no substantial progress has taken place in court before the agency has denied the claim and the court is notified of the denial. These Circuits note the duplicitous filings and wasted effort in requiring refiling of a court case when the inclusion of a sum certain denial notice in the court file can cure any technical defect. See also, Abernathy v. United States, 732 F.Supp. 98 (D. Kan. 1990) which adopted the Celestine position.

In the case at bar the Seventh Circuit joined the fifth circuit in rejecting that standard. See, Gregory v. Mitchell, 634 F.2d 199, 204 (5th Cir. 1981), Reynolds v. United States, 748 F.2d 291 (5th Cir. 1984), United States v. Burzynski Cancer Research Institute, 819 F.2d 1301, 1306-07 (5th Cir. 1987). The ninth circuit joined that rejection in its decision of June 11, 1992 of Jerves v. United States, 966 F.2d 517 (9th Cir. 1992).

In this case Mr.McNeil's early filing coupled with the loss of Mr. McNeil's case "in the mass of prisoner litigation" at the District

Court level, combined to bar his day in court. The United States District Court dismissed his action more than two years after it had been filed. The United States moved for dismissal approximately 13 months after Mr. McNeil had included a copy of the agency sum certain denial in his filings in the district court. The loss of his case in the district court in the press of prisoner litigation delayed any dismissal of Mr. McNeil's "prematurely" filed lawsuit until long after the time to refile it had passed. Moreover, the District Court dismissed the case although the agency denial of the sum certain request had been incorporated in the district court file approximately 17 months prior. [Indeed, by the terms of the Federal Tort Claims Act 28, U.S.C. Section 2675 (a) even had Mr. McNeil failed to file the sum certain denial letter as he did on August 7, 1989, at least by August 18, 1989, the six month period for the United States Public Health Service to respond to Mr. McNeil's first demand of January 17, 1989 would have passed and the filing of suit would have been proper.]

While the procedural niceties of the Federal Tort Claims Act may "pose little difficulty for the knowledgeable inmate accustomed to grievances and court actions....[T]hey are a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim." McCarthy v. Madigan, ___ U.S. ___, 112 S.Ct. 1081, 1090, 117 L.Ed.2d 291 (1992) (Bivens action, comment relates to exhaustion of intra prison grievance mechanism).

Whether a narrow procedural construction of the Federal Tort Claims Act for prematurely filed suits is consistent with Congressional intent for a statute reflecting "Congress's clear

intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act...." United States v. Nordic Village Inc., ___ U.S. ___, 112 S.Ct. 1011, 1014, 117 L.Ed.2d 181 (1992), (citing inter alia, United States v. Yellow Cab Co., 340 U.S. 543, 547, 554-555 (1951)) to broadly waive sovereign immunity is a question important enough to receive this court's answer.

The Federal Tort Claims Act is an important statute. The instant case involves the ability of citizens, unlearned in the law, to litigate civil claims against the Federal Government.

Apparent injustice to F.T.C.A. plaintiffs disserves the interests of citizens of the United States and flies in the face of the sweeping waiver of sovereign immunity intended by Congress when the F.T.C.A. was enacted. It is particularly unjust in this case, for as the opinion for the United States Court of Appeals for the Seventh Circuit notes, it is now too late for Mr. McNeil to refile his case.

Conclusion

For these reasons the Petitioner respectfully requests that this court grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

Respectfully submitted,

Allen E. Shoenberger
One East Pearson
Chicago, Ill. 60611
312 915 7141

September 17, 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM McNEIL,

Plaintiff,

v.

UNITED STATES PUBLIC HEALTH SERVICE,

Defendant.

No. 89 C 1822

JUDGE JAMES H. ALESIA

DOCKETED
JAN 25 1991

MEMORANDUM OPINION AND ORDER

William McNeil brings this action seeking damages against the United States Public Health Service ("the government") under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671, et seq. ("the FTCA"). The pro se complaint charges the government with conducting experiments on prisoners at the Stateville Correctional Center without first obtaining permission from the prisoners. The experiments allegedly were designed to study the spread of infectious diseases among inmates. McNeil asserts he was exposed to AIDS as a result of the experiments and the government's negligence. He requests twenty million dollars in damages. The government has moved to dismiss the complaint for lack of subject matter jurisdiction. For the reasons that follow, the court grants the motion.

The government's motion is based on two limitations periods contained in the FTCA. The first statute, 28 U.S.C. § 2401(b), governs the time for commencing an FTCA suit. It provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after

APPENDIX A

such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

The second statute, 28 U.S.C. § 2675(a), imposes a requirement that the claimant exhaust his administrative remedies before commencing suit under the FTCA. It states, in pertinent part:

> An action shall not be instituted upon a claim against the United States for money damages...unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section....

The effect of these statutes is to require a claimant to file an administrative claim before commencing suit under the FTCA. The administrative claim must be filed within two years of the time the claim accrued. If the claim is denied, the claimant has six additional months to file his FTCA suit. If the agency does not act on the claim within six months, the claimant has the option of commencing suit without a final disposition of his administrative claim.

McNeil presented his FTCA case to the court on March 6, 1989. A motion for leave to file in forma pauperis accompanied the complaint. The court ordered ruling on the in forma pauperis motion held in abeyance on June 12, 1989. On July 7, 1989, McNeil filed his administrative claim with the Department of Health and Human Services. The administrative claim was denied in a letter dated July 21, 1989. The letter notified McNeil that he had six months to file an FTCA suit. Meanwhile, the complaint McNeil had sent to the court in March got lost in the crush of prisoner litigation filed in this

district. On April 15, 1990, McNeil paid the filing fee and his complaint was formally filed.

Citing the date McNeil paid the filing fee, the government's motion to dismiss argues that the court lacks jurisdiction over McNeil's claim because he filed the suit more than six months after the denial of his administrative claim. In his responsive brief, McNeil contests the date the government relies on for the filing date of this case. He urges that he commenced suit on March 6, 1989, the day the Clerk assigned it a docket number. The government, in reply, notes that this alternative date does not cure the jurisdictional defect. McNeil did not file his administrative claim until July 1989. The government maintains that if the court accepts McNeil's argument that the March 1989 date is the proper date of filing, it still must dismiss the action, not because McNeil filed his FTCA suit tardily, but rather because he commenced it prematurely.

The first issue the court must decide then is the date of filing for purposes of determining the limitations period. The answer to this question is found in Smith-Bey v. Hospital Administrator, 841 F.2d 751 (7th Cir. 1988). The court there noted "the generally accepted rule that a complaint is deemed 'filed' within the meaning of Fed.R.Civ.P. 3 for purposes of invoking the court's jurisdiction over an action when it is placed in the custody of the district court clerk." Id. at 757 n.5. Thus, the operative date of filing in this case is not the day McNeil paid the filing fee, but rather the day he lodged his complaint with the court and filed his motion asking for leave to file without prepayment of the filing fee. In short, McNeil commenced his suit on March 6, 1989.

The federal court has no jurisdiction to entertain a FTCA suit commenced before satisfaction of the administrative exhaustion requirement under § 2675(a). Charlton v. United States, 743 F.2d 557, 558-59 (7th Cir. 1984); Erxleben v. United States, 668 F.2d 268, 270-71 (7th Cir. 1981). In light of the statutory restrictions Congress has placed on judicial authority to hear FTCA claims against the United States, courts consistently have dismissed for lack of jurisdiction suits brought either without prior attempt to file an administrative claim, e.g., Best Bearings Co. v. United States, 463 F.2d 1177 (7th Cir. 1972), or after expiration of the six-month period an agency is allotted to make a final determination on an administrative damage claim. E.g., Charlton, supra. Between these two extremes, however, lies a third category of cases, a category into which McNeil's case falls. Although McNeil's case was premature at the time of filing, he had exhausted his administrative remedies by the time the government filed its motion to dismiss. The courts have split on their treatment of cases where plaintiff has exhausted his administrative remedies during the pendency of the FTCA suit.

In Celestine v. Veterans Administration Hospital, 746 F.2d 1360 (8th Cir. 1984), the Eighth Circuit permitted an FTCA suit to proceed even though plaintiff had not filed his administrative claim prior to commencing his complaint in federal court. The government moved to dismiss the complaint for lack of jurisdiction soon after it was filed. The district court, however, did not rule on the motion until eighteen months later. In the meantime, unbeknownst to the court, the plaintiff had filed for and been denied relief by the appropriate administrative agency. The Eighth Circuit reversed dismissal of the action, holding that the requirements of § 2675(a) were met if the plaintiff had exhausted his

administrative remedies before "any substantial progress had been made on the case." Id. at 1362. Citing Kubicki v. United States, 591 F.2d 1092 (3d Cir. 1979), rev'd on other grounds, 444 U.S. 111 (1979), the court reasoned that it would be a waste of effort to dismiss the case and require refiling when it was clear that the plaintiff had exhausted his remedies at the time of the district court's decision. Id. Contrary to the position of the Eighth and Third Circuits, the Fifth Circuit has refused to construe § 2675(a) to allow courts to accept jurisdiction over suits filed before expiration of the six-month waiting period. In Reynolds v. United States, 748 F.2d 291 (5th Cir. 1984), plaintiff had filed her FTCA complaint four months after she had filed her administrative claim. Although the administrative agency had denied the plaintiff's claim by the time the district court dismissed her suit, the Fifth Circuit held that this was not enough to save the action from dismissal for lack of jurisdiction. "[S]uits against the government under the FTCA must be filed in strict compliance with its provisions." Id. at 292. The FTCA mandates exhaustion of administrative remedies as a jurisdictional predicate to the filing of suit under the FTCA. Thus, for jurisdiction to exist, it must exist at the time of filing. Because plaintiff had not received a final determination of her administrative claim at the time she filed her suit, Reynolds concluded that the district court lacked subject matter jurisdiction at the outset, a defect that could not be cured by a subsequent exhaustion of administrative remedies. Id.

The equities may weigh in favor of McNeil, but the court finds itself persuaded by the reasoning of the Fifth Circuit. Moreover, although it has not spoken directly to the issue, the Seventh Circuit generally has opted for strict construction of jurisdictional

requirements of the FTCA. As it explained in Charlton, 743 F.2d at 558, "[t]he Federal Tort Claims Act is a congressional waiver of sovereign immunity, and a plaintiff's failure to comply with the requirements of the Act leave the plaintiff with no forum for his or her claim." Statutory conditions limiting the terms of the government's consent to be sued as sovereign must be strictly construed. United States v. Kubrick, 444 U.S. 111, 117-18 (1979). The conditions cannot be waived. Erxleben, 668 F.2d at 271. Nor are they subject to the same equitable considerations that might apply in litigation between private parties. Houston v. United States Postal Service, 823 F.2d 896, 902 (5th Cir. 1987), cert. denied, 485 U.S. 1006 (1988). McNeil did not comply with the condition that he exhaust his administrative remedies prior to bringing this action. While dismissal at this time effectively will leave him without any means to pursue his claim against the government further, this court cannot overlook the effect of his premature filing.

In Cooper v. United States, 442 F.2d 908 (7th Cir. 1971), a plaintiff filed an FTCA suit four months after he had filed an administrative claim for damages with the Attorney General of the Untied States. Although the court affirmed dismissal on grounds that plaintiff had commenced the suit more than two years after his claim accrued, it also indicated that the court could properly have dismissed the suit for failure to exhaust administrative remedies since plaintiff had jumped the gun in filing his suit before the mandatory six-month period had elapsed. Id. at 911. The court remarked that limitations periods conditioning a waiver of sovereign immunity should be liberally construed in favor of repose. Id. at 912. If under Cooper it is proper to dismiss a FTCA action brought only four months after the filing of an administrative claim, it follows that a FTCA

complaint filed in federal court before the administrative claim is even filed must also be dismissed.

Accordingly, finding that it lacks subject matter jurisdiction, the court grants the government's motion and directs the clerk to enter judgment dismissing this case in its entirety.

JAMES H. ALESIA
United States District Judge

Dated: JAN 24 1991

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

DOCKETED

JAN 28 1991

William McNeil

JUDGMENT IN A CIVIL CASE

V.

United States Public Health Service

CASE NUMBER: 89 C 1822

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court finds that it lacks subject matter jurisdiction over this action. The defendant United States Public Health Service's motion to dismiss is granted, and the clerk is directed to enter judgment dismissing this case in its entirety.

Sent for Microfilming

JAN 28 1991

Filmed JAN 29 1991

January 24, 1991

Date

H. STUART CUNNINGHAM

Clerk

Darrel L. Wiley

(By) Deputy Clerk

25

U.S. GOVERNMENT PRINTING OFFICE: 1985—608 062

nature of the Guidelines sentencing process is again unhappily reflected in this case, resulting in what the district court and, I believe, my colleagues understandably recognize to be a harsh sentence. The district judge sentenced Andruska to 42 months imprisonment, hardly a slap on the wrist. The Guidelines calculation is 97–121 months although the statutory maximum specified in 18 U.S.C. § 1071 under which she was convicted is 60 months. Unfortunately, under the Guidelines, neither the district judge nor we appear to have discretion to impose a reasonable sentence. The serious defects and injustice in the Guidelines sentencing process have been noted by a number of courts, most comprehensively in the concurring opinion of Judge Edwards in *United States v. Harrington*, 947 F.2d 956, 962–70 (D.C.Cir.1991). I join in the disposition here, unhappy though I believe it to be, because Congress and the Sentencing Commission have foreclosed a more just result.

West Publishing Co. KEY NUMBER SYSTEM

William McNEIL, Plaintiff–Appellant,

v.

UNITED STATES of America, Defendant–Appellee.

No. 91–1303.

United States Court of Appeals, Seventh Circuit.

Argued April 27, 1992.

Decided May 20, 1992.

As Amended May 26, 1992.

Rehearing and Rehearing En Banc Denied June 26, 1992.

Inmate appealed from order of the United States District Court for the Northern District of Illinois, James H. Alesia, J., dismissing his Federal Tort Claims Act (FTCA) action challenging prison conditions. Court of Appeals, Easterbrook, Circuit Judge, held that when administrative claim is denied before any substantial progress has been made in pending litigation, FTCA suit must be refiled to be effective.

Affirmed.

Ripple, Circuit Judge, filed dissenting opinion.

1. United States ⇐127(2)

When administrative claim is denied before any substantial progress has been made in pending litigation, Federal Tort Claims Act suit must be refiled to be effective. 28 U.S.C.A. §§ 2401(b), 2675(a).

2. United States ⇐140

Inmate's letter protesting prison conditions and requesting counsel following denial of his damages claim by the Department of Health and Human Services was not a complaint necessary to satisfy Federal Tort Claims Act's filing requirements. 28 U.S.C.A. §§ 2401(b), 2675(a); Fed.Rules Civ.Proc.Rules 3, 8, 28 U.S.C.A.

Allen E. Shoenberger, Chicago, Ill. (argued), for plaintiff-appellant.

Eileen M. Marutzky, Jack Donatelli (argued), Asst. U.S. Attys., Office of the U.S. Atty., Civil Div., Appellate Section, Chicago, Ill., for defendant-appellee.

Before CUMMINGS, EASTERBROOK, and RIPPLE, Circuit Judges.

EASTERBROOK, Circuit Judge.

William McNeil is a prisoner of Illinois. In March 1989 he filed this action under the Federal Tort Claims Act, contending that the prison had compelled him to participate in experiments conducted or financed by the United States Public Health Service. One of these experiments, McNeil alleged, was to share a cell with another prisoner who has AIDS. He demanded $20 million in damages.

Among the suit's problems was McNeil's failure to pursue administrative remedies as the FTCA requires. 28 U.S.C. § 2675(a).

APPENDIX B

McNeil filed a claim in June, seeking $500,000 on the assertion that he had contracted hepatitis and been exposed to AIDS. The Department of Health and Human Services denied this claim on July 21, 1989. Instead of commencing a new suit, McNeil sought assistance in the existing one, attaching the administrative decision to a request filed in August 1989 for the appointment of counsel. The district judge eventually dismissed the action on the ground that it had been filed too soon. It is too late to file another.

According to 28 U.S.C. § 2401(b), a tort claim against the United States must be "begun within six months after the date of mailing ... of notice of final denial of the claim by the agency to which it was presented." The administrative denial was mailed on July 21, 1989, so McNeil had between then and January 21, 1990, to begin his action. The complaint filed in March 1989 was too early. This left two options. Perhaps the document filed in March 1989 loitered on the docket, springing into force when the agency acted. Or perhaps the request for counsel in August 1989, during the six-month period, marks the real "beginning" of the action. The district court rejected both options, and McNeil, with the assistance of counsel appointed by this court, renews the arguments here.

[1] Two courts of appeals have held that when "the administrative claim is denied before any substantial progress has been made in the pending litigation, the suit need not be refiled to be effective.... To hold that refiling was necessary would involve duplicitous pleadings and wasted effort." *Kubrick v. United States*, 581 F.2d 1092, 1098 (3d Cir.1978), reversed on other grounds, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). Accord, *Celestine v. Veterans Administration*, 746 F.2d 1360, 1363 (8th Cir.1984). One circuit has gone the other way. *Gregory v. Mitchell*, 634 F.2d 199, 204 (5th Cir.1981); *Reynolds v. United States*, 748 F.2d 291 (5th Cir.1984); *United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1306–07 (5th Cir.1987). Make that two: we join the fifth circuit.

Neither the third nor the eighth circuit discussed the language of § 2675(a): "An action shall not be instituted upon a claim against the United States for money damages ... unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing" or six months have passed without decision. This statute does not authorize suits or postpone adjudication of suits; it forbids the institution of suits prior to the administrative decision. Judges of two circuits believe that Congress erred in writing a prohibition, but that does not explain why the statute Congress actually enacted may be disregarded.

Many statutes have a structure similar to § 2675(a), most prominently the environmental laws. *Hallstrom v. Tillamook County*, 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989), considers a typical provision, in the Resource Conservation and Recovery Act of 1976: "No action may be commenced ... prior to 60 days after the plaintiff has given notice of the violation" to various persons. 42 U.S.C. § 6972(b)(1). Some courts read this language just as the third and eighth circuits treat § 2675(a): The plaintiff may file the suit any time, but the litigation must remain inactive on the docket during the 60 days reserved for negotiation. The Supreme Court disagreed, holding that "[n]o action may be commenced" means that "[n]o action may be *commenced*", not that "[n]o action may be *prosecuted*". Section 2675(a) is no less insistent that "[a]n action shall not be *instituted*" before the administrative action (or six months of administrative inaction). *Hallstrom* observes that negotiation may be more effective if there is not already a lawsuit on file; that observation is no less true of the FTCA than of the RCRA. And § 2675(a), as a condition on access to the Treasury, is a prime candidate for literal interpretation, see *Kubrick*, 444 U.S. at 117–18, 100 S.Ct. at 356–57, more so than fetters on litigation against persons despoiling the environment. *Hallstrom* ordains the interpretation of § 2675(a).

[2] March 1989 was too early. The suit did not linger, awaiting administrative action. Unless McNeil began a fresh suit within six months after July 21, 1989, he loses. The only candidate is the collection of materials filed in August 1989: a letter protesting conditions in the prison and implicitly requesting counsel, an "Affidavit in Support of Motion for Appointment of Counsel" (although there was no motion), a statement of the balance in McNeil's prison trust account ($2,117.61), and a copy of the administrative decision plus a cover letter from the agency. McNeil's lawyer contends that the complaint of March was not begun until these documents "perfected" the filing. Yet Fed.R.Civ.P. 3 says that "[a] civil action is commenced by filing a complaint with the court." A complaint, not a request for a lawyer, begins the action. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984). McNeil's contention that the set of documents "perfected" the action repackages his submission that the suit lingered, awaiting activation by the administrative action. This variation meets the fate of the theme.

Only if the letter was itself a complaint does the submission satisfy the statute. *Baldwin County Welcome Center* holds that the combination of a request for counsel plus an administrative decision (there, a letter from the EEOC giving the person the right to file suit under Title VII of the Civil Rights Act of 1964) does not satisfy Fed. R.Civ.P. 8 and hence is not a complaint. By contrast, a letter narrating the facts and making a claim for relief may be a complaint. *Pearson v. Gatto*, 933 F.2d 521, 526–27 (7th Cir.1991). Where does McNeil's letter fall on this spectrum? We need not decide, for McNeil did not characterize the letter as a complaint in the district court (where he represented himself) or here (where a professor of the Loyola School of Law is serving as his counsel). Whatever scope the doctrine may have in civil litigation, see *Deppe v. Tripp*, 863 F.2d 1356 (7th Cir.1988), it was not plain error in light of *Baldwin County Welcome Center* to treat this document as what it purported to be—a request to get on with a pending case, rather than a new complaint. *Baldwin County Welcome Center* holds that a person who receives a notice from an agency telling him exactly what to do (file a complaint) has no equitable claim to lenient treatment when he chooses to do something else. Just so here.

AFFIRMED.

RIPPLE, Circuit Judge, dissenting.

In my view, we need not resolve in this appeal the difficult issue of whether a Federal Tort Claims Act suit must be refiled when the administrative claim is denied before any substantial progress has been made in the pending litigation. That issue has divided the courts of appeals and certainly deserves resolution by the Supreme Court of the United States. The Court took note of the issue in 1979 but explicitly declined to resolve it. *See United States v. Kubrick*, 444 U.S. 111, 115 n. 4, 100 S.Ct. 352, 356 n. 4, 62 L.Ed.2d 259 (1979).

Here, it is clear that the plaintiff, a prisoner proceeding pro se, attempted to refile the action after the denial of the administrative claim. On August 7, 1989, he wrote to the district court. His letter sets forth the gravamen of his complaint against the Public Health Service, asks the court to accept "this letter as a proper request, whereas plaintiff can properly *commence* his legal action accordingly." (Emphasis supplied). Under the circuit's holding in *Pearson v. Gatto*, 933 F.2d 521, 526–27 (7th Cir.1991), this letter serves as an adequate complaint.[1]

ORDER

Plaintiff-Appellant filed a petition for rehearing and suggestion of rehearing en banc on May 28, 1992. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED. Judge Flaum did not participate in the consideration or decision of this case.

1. I respectfully differ with my colleagues as to whether Mr. McNeil raised this issue adequately

UNITED STATES of America, Plaintiff-Appellee,

v.

Darryl TIPTON, Defendant-Appellant.

No. 90-3649.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 12, 1991.

Decided May 20, 1992.

Defendant was convicted in the United States District Court for the Northern District of Illinois, James B. Zagel, J., of embezzlement and evading federal income tax, and he appealed. The Court of Appeals, Coffey, Circuit Judge, held that: (1) lay testimony identifying defendant's handwriting or signature on phony documents was admissible; (2) prosecutor did not misstate law concerning presumption of innocence in course of closing argument; and (3) prosecutor did not comment of defendant's failure to testify at trial in violation of Fifth and Fourteenth Amendment due process rights.

Affirmed.

1. **Criminal Law** ⇐469.2, 1153(1)

District court has broad discretion in deciding whether to admit expert testimony, and its determination will be affirmed unless manifestly erroneous. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

2. **Criminal Law** ⇐478(2)

Qualification of handwriting expert is sufficient if expert testifies to related experience, knowledge, or training. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

3. **Criminal Law** ⇐491(1)

District court did not abuse its discretion in admitting testimony of expert witness in area of forensic document examination identifying defendant's handwriting or signature on phony documents.

4. **Criminal Law** ⇐452(4)

Lay testimony identifying defendant's handwriting or signature on phony documents, as part of prosecution for embezzlement and tax evasion, was admissible where witness was familiar with defendant's handwriting and signature as result of observing many documents prepared by defendant. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

5. **Criminal Law** ⇐717

Prosecutor's comment on evidence in closing argument, prefaced with reference to government's case, merely related to inferences to be drawn from evidence to rebut presumption of innocence and did not misstate law concerning presumption of evidence.

6. **Criminal Law** ⇐721(3)

Prosecutor's allusion to what defendant in embezzlement prosecution would have said to FBI agent if defendant were to take position that he had inspected work of all contractors was not reference to defendant's failure to testify and thus did not violate defendant's Fifth and Fourteenth Amendments rights. U.S.C.A. Const. Amends. 5, 14.

7. **Criminal Law** ⇐1159.2(2, 7)

Defendant attacking sufficiency of evidence has heavy burden and appellate court may overturn verdict only if record contains no evidence, regardless of how it is weighed, from which jury could find guilt beyond reasonable doubt.

8. **Embezzlement** ⇐44(1)

Internal Revenue ⇐5299

Testimony that defendant had engaged in fraudulent payout scheme involving money from Department of Housing and Urban Development (HUD), that documents involving transfer of funds from

in this court. *See* Appellant's Br. at 7. The government shares my view. *See* Supplemental Government Br. at 4. Nor, given the standards of pleading to which we hold incarcerated pro se litigants, do I believe that the characterization of the document as a complaint was "waived" in the district court. Mr. McNeil made one point clear to the district court in August 1989: despite the difficulties of filing papers with the court from Stateville Correctional Center, he was attempting to "commence his legal action."

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: May 20, 1992

BEFORE: **Honorable** Walter J. Cummings, Circuit Judge

Honorable Frank H. Easterbrook, Circuit Judge

Honorable Kenneth F. Ripple, Circuit Judge

No. 91-1303

WILLIAM MCNEIL,
Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,
Defendant - Appellee

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 89 C 1822, Judge James H. Alesia

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered this date.

(1061-030690)

In the United States Court of Appeals
for the
Seventh Circuit

Case No. 91-1303

William McNeil, Plaintiff-Appellant,	
v.	Appeal from the United States District Court Northern District of Illinois Judge James H. Alesia, Presiding
The United States Public Health Service, Defendant-Appellee.	

Petition for Rehearing
with
Suggestion for Rehearing en Banc

U.S.C.A - 7th Circuit
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APPENDIX C

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Pub. L. 89-506, 80 Stat. 307, (July 18, 1966)
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Pub. L. 89-506, 80 Stat. 306, (July 18, 1966)
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In the United States Court of Appeals
for the
Seventh Circuit

Case No. 91-1303

William McNeil, Plaintiff-Appellant, v. The United States Public Health Service, Defendant-Appellee.	) Appeal from the) United States District Court) Northern District of Illinois) Judge James H. Alesia,) Presiding

Petition for Rehearing
with
Suggestion for Rehearing en Banc

This is a case of exceptional importance. The decision rendered on May 20, 1992 created a conflict between this court of appeals and several other courts of appeals as recognized by the slip opinion at p. 2. Moreover, it involves an important statute, the Federal Tort Claims Act, and the ability of citizens, unlearned in the law, to litigate civil claims against their own Federal Government.

In days of widespread citizen contempt for government, exemplified by the riots in Los Angeles and reactions to the house bank overdraft scandal, judicial enactment of a special exemption for the federal government from suit, is shocking. Such a special exemption is both unjust and contrary to any expressed Congressional intent.

It is particularly unjust in this case, for as the slip opinion notes, it is now too late for the Mr. McNeil to file

another case. On May 20, 1992 this court denied Mr. McNeil his day in court. His error was to file too soon. His early filing prevented him from having any opportunity to prove that agents of the federal government conducted AIDS and Hepatitis B experiments upon Mr. McNeil without his consent. Mr. McNeil alleged that these experiments resulted in his contracting hepatitis. McNeil's early filing coupled with the loss of Mr. McNeil's case "in the mass of prisoner litigation" at the District Court level, combine to bar his day in court. The loss of his case in the district court delayed any dismissal of his "prematurely" filed lawsuit until after the time to refile it had long passed. A layperson upon hearing McNeil's story might believe that the federal legal system is engaged in a conspiracy to deny justice to Mr. McNeil, perhaps as part of a "coverup." Such apparent injustice to F.T.C.A. plaintiffs disserves the interests of citizens of the United States.

Plaintiff-Appellant also asserts as a reason for requesting rehearing that at oral argument on April 27, 1992 the court raised several cases (including in particular Hallstrom v. Tillamook County, 493 U.S. 20 (1989)) with which neither the attorneys for the government nor the plaintiff were familiar. Thus neither party in this case has given the court the benefit of their analysis of these cases.

In addition, questions were asked at oral argument regarding the legislative history of the F.T.C.A.; questions that were answered by neither side. This case presents a serious question of federal statutory interpretation upon which the

decision by this court should be as informed as possible.

I. Hallstrom v. Tillamook County is distinguishable; the Supreme Court did Not Bar the Suit, for It Noted that the Suit Could be Refiled

A. Hallstrom is Distinguishable

Each of the statutes referred to by Justice O'Connor's opinion for the court in Hallstrom v. Tillamook County, 493 U.S. 20, 107 L.Ed. 2d 237, 110 S.Ct. 304 (1989) are environmental statutes patterned after the Clean Air Amendments of 1970. See n. 1, at 493 U.S. 22, 110 S.Ct. 307, 107 L.Ed. 2d 244 (1989). The 1970 Act does not appear to have been patterned in any way after the Federal Tort Claims Act. Instead RCRA (the Resource Conservation and Recovery Act) exemplifies completely separate legislative development from that of the F.T.C.A. which was originally enacted in 1946.

The relevant language of the RCRA statute was: "No action may be commenced under paragraph (a)(1) of this section (1) prior to sixty days after the plaintiff has given notice of the violation A) to the Administrator of the EPA, B) to the state in which the alleged violation occurs; and C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order,...." 42. U.S.C. Section 6972(b)(1) (1982 ed.) (emphasis added)

That language is different from the F.T.C.A. language, "An action shall not be instituted upon a claim ... 28 U.S.C. s. 2675 (a). (emphasis added)

In Hallstrom the Supreme Court pointed out that the word "commenced" was identical to the language of Rule 3 of the

Federal Rules of Civil Procedure that states "a civil action is commenced by filing a complaint with the court." 493 U.S. 26, 107 L.Ed.2d 246. The Supreme Court read the language of RCRA "in light of this rule." 493 U.S. 26, 107 L.Ed.2d 246.

In Hallstrom the Supreme Court also observed that Congress had explicitly carved out an exception from the RCRA bar on prematurely filed suits by 1984 amendments to RCRA, See, e.g. 42 U.S.C. s. 6972(b)(1)(A)(1982 ed.), but the court pointed out that no exception applied to the situation in Hallstrom and the court asserted no ability to carve out an exception when Congress had declined to do so. 493 U.S. 27, 107 L.Ed.2d 246.

Moreover, the court pointed out in Hallstrom that the case had been filed by a lawyer (indeed, a lawyer who at oral argument in the Supreme Court admitted his inadvertent neglect in failing to notify the state and federal agencies), as were most RCRA lawsuits. [McNeil proceeded pro se.]

Other factual distinctions exist as well. Negotiation between state and federal governments and RCRA site polluters involve more parties than do F.T.C.A. negotiations. Such negotiations are quite important in RCRA and CERCLA environmental cases. F.T.C.A. negotiations occur infrequently, they certainly did not occur with Mr. McNeil. A delay in suit for only 2 months in RCRA cases is likely to have quite a different practical impact from a 6 month delay in all F.T.C.A. cases. Different delay periods suggest different, not similar, Congressional objectives.

B. The Supreme Court Decision in Hallstrom did not deny

petitioners a day in court

Most importantly, however, the Supreme Court in Hallstrom stated, "Nor will the dismissal of this action have the inequitable result of depriving petitioners of their "right to a day in court. . . . Petitioners remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards." 493 U.S. 32, 107 L.Ed. 2d 250. Nor is this right hypothetical, for the pollution site in Hallstrom is unlikely to disappear overnight (unlike Mr. McNeil's case).

II. Legislative History Supports a Practical Construction of the Federal Tort Claims Act

There is limited legislative history regarding the Federal Tort Claims Act matter at issue in this case. Relevant (and fairly contemporaneous (1948 and 1949)) discussion exists in Congressional committee reports which advocated passage of similar notice requirements in areas of law comparable to F.T.C.A. litigation as well as during Congressional Committee discussion of the F.T.C.A. statute of limitations provision.

Senate Report 80-1593 (1948), a report of the 80th Congress regarding an Admiralty bill (H.R. 238), suggested a similar waiting period for certain admiralty claims under the Public Vessels Act or Suits in Admiralty Act: i.e. delaying a suit until 6 months had passed after the claim had been presented in writing. The Federal Tort Claims Act provision (which then applied only to claims under $1,000) was cited as a model, with the reasons for such a delay stated as follows:

"It is thought that such a provision would be salutary in avoiding unnecessary litigation and would constitute a financial saving both to the claimant and to the United States." (S.Rep. 80-1593, p. 11, P.L. 80-695, Admiralty Jurisdiction -Extension (1948) 1948 WL 1837 Leg. Hist.) (House Report 80-1523, March 8, 1948; and Senate Report 80-1593, June 11, 1948) On the previous page the committee report indicated that the reason for delaying litigation was to "afford the Federal Agency an opportunity to adjust the claim prior to the filing of any suit." Thus a six month opportunity to adjust the claim was given to the federal agencies after receiving a written claim. The committee remarked that, "In the usual case of damage to land structures, there is no question of liability and the situation makes very desirable the availability of an opportunity for settlement and adjustment without litigation."

As a legal and practical matter, each of the reasons cited by this Senate Report (actually a report employed both in the Senate and the House) has either been accomplished in the case at bar by this time of Mr. McNeil's August filing or else is inapplicable to his case (maritime crashes into land structures having nothing to do with the case.)

Congress demonstrated conscious intention to make F.T.C.A. litigation more like ordinary civil litigation when it expanded the time to institute suit under the F.T.C.A. See, House of Representatives Report 81-276, P.L. 81-55, Federal Tort Claims Act - Time for Bringing Suit, 81st Congress, 1st Sess., 1949 WL 1677 (Legis. Hist.) (March 21, 1949) (Only Report on this

legislation) The reported bill (inter alia) enlarged the time for filing suit from 1 year to 2 years from the date of accrual of an action. In justification of the changes proposed (which were enacted in 1949), the report stated:

> "The committee feel that, in comparison to analogous State and Federal statutes of limitation, the existing 1-year period is too short and tends toward injustice in many instances. For example, an analysis of the statutes of limitation of the 48 States and the District of Columbia reveals that the average limitation period provide for personal injury cases is 2.96 years, for property damage claims it is 3.90 years, and for cases of death by wrongful act it is 1.90 years. The over-all combined average is, accordingly 2.92 years, and this over-all average is the one to which the Tort Claims Act limitation should be compared with since the Tort Claims Act covers all three types of torts under one inclusive period of limitation. . . . . Federal statutes providing time limitations for the bringing of tort actions indicate an over-all average of 2.2 years. . . . . It will be observed, then, from the foregoing statistics, that the existing 1 year limitation is manifestly unjust and not in consonance with the practice prevailing in analogous departments of the law." (1949 WL 1677, pp. 3-4)

To various federal agencies that opposed the change on grounds that it would "jeopardize the defenses of the Government in tort suits" the committee report replied, "No clear distinction can be seen between the accessibility of defenses to the Government than to ordinary law or private defendants." (1949 WL 1677, p. 5)

The report concluded with a paragraph as follows:

> "It is not the intention of the Federal Government to deprive tort claimants of their day in court or of their remedies. Nor, on the other hand, does it propose to encourage delay in the enforcement of a claimant's rights or to harass the Federal agencies in their defense against such suits by increasing the difficulty of their procurement of evidence. . . . The period of 2 years proposed in the bill represents a happy medium which has been tested and found satisfactory in the laboratory of legal experience." (1949 WL 1677, pp 5-6.)

The sense of the Congressional Committee Report is that F.T.C.A. suits against the federal government should be as similar as possible to suits against ordinary defendants. The federal government was not supposed to receive special defenses, procedural defenses in particular, that were not available to other defendants.

Rejection of the arguments presented to this court on behalf of Mr. McNeil would have just the effect that the Congressional Committee report abjured; Mr. McNeil would be denied his day in court and the federal government would have a "special defense." It would not be enough to "cut square corners" when dealing with the federal government, those corners would have to be cut in particular and precise order (clockwise - o.k. suit proceeds; counterclockwise - no! Go back and do it again!) Not one shred of legislative history supports converting F.T.C.A. litigation into grand games of "Mother May I."

III. The Practical Interplay of the Statute of Limitations and Pre-suit Notice Requirements under the Federal Tort Claims Act Suggest no Technical Bar was Intended by the Notice Requirement

The statute of limitations and the requirement of notifying a federal agency 6 months prior to filing suit originated in the development of two particular statutory sections, current sections 28 U.S.C. sec. 2401 b) and 2675. If one considers historical development of both sections, there is nothing supporting a "hypertechnical" requirement reading given by this court, rather, a practical, common sense interpretation appears more consonant with Congressional conception of the

purposes of the F.T.C.A. [Indeed, it its first, limited appearance (suits below $1,000) the first "six month" period extended the time to file suit beyond the statute of limitations, it did not limit suit.]

Since Mr. McNeil has fully complied with all substantial and substantive requirements of the F.T.C.A. his suit should proceed.

A: Section 2401 b) statutory development

The origin of the current text of the Federal Tort Claims Act Section 2401 b) began with section 420, 60 Stat. 845 (79th Cong. 2nd sess) August 2, 1946 which read as follows:

> "Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section ~~410 of~~ this title, if it would otherwise expire before the end of such period."

Section 410 gave the claimants the right to withdraw a claim from a Federal agency by giving 15 days notice in writing.

The 1946 language was codified in 1948 by 62 Stat. 971 (80th Cong. 2nd sess) (June 25, 1948) in subsection b) in section 28 U.S.C. section 2401 to read as follows:

> "A tort claim against the United States shall be forever barred unless action is begun thereon within one year after

> such claim accrues, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within one year after such claim accrues. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until after the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim."

In 1949 a revision of the first sentence of 2401 (b) extended the one year period for most suits to 2 years, 63 Stat. 62 (81st Cong. 1st sess.) (May 6, 1949).

In 1959 all references to $1,000 were changed to $2,500. Pub.L. 86-238, 73 Stat. 472 (86th Cong. 1st sess.) (Sept 8, 1959).

In 1966 the text of section 2401(b) took its current form, by eliminating all distinctions to amounts below and above $2,500 and thus requiring submissions of all claims to the "appropriate Federal agency." Pub. L. 89-506, 80 Stat. 307, (89th Cong. 2nd sess.) (July 18, 1966).

B: Section 2675 statutory development

The statutory origin of the current text of 28 U.S.C. section 2675 began with section 420 quoted above and also with section 410 b) of 60 Stat. 844 (Aug. 2 1946) (79th Cong. 2nd sess) which read in part as follows:

> Sec. 410 b) .... No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: Provided , that the claimant may, upon 15 days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: ....

Part 2 of the title conferred the authority upon the head

of a federal agency or his designee to consider, ascertain, adjust, determine and settle claims for money damages for under $1,000. 60 Stat. 843

That section was codified by 62 Stat. 983, (80th Cong. 2nd sess) (June 25, 1948) in 28 U.S.C. section 2675. That section now read:

> 2675: Disposition by federal agency as prerequisite: evidence
>
> a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.
>
> b) The claimant, however, may upon 15 days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this subsection shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.
>
> c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

After a minor (and irrelevant) change in 1949 (63 Stat. 107, (May 24, 1949)), section 2675 took its current form in 1966 with the enactment of 80 Stat. 306, Pub. L. 89-506 (July 18, 1966).

It is worth noting that section 2675 as codified, with its internal and caption reference to various matters of evidence (limiting suits to the amount of the original demand unless a limited category of newly discovered evidence justifies exceptions) expands the scope of possible claims by an

individual. No language explicitly precludes suit. Moreover, the "evidence" caption unmistakably refers to subsections (b) and (c). If that caption is also read to refer to section (a), it would suggest that the proof of such agency notification was also an evidentiary matter, not a jurisdictional matter.

However, the close interrelationship between subsections (a) and (b) is best illustrated by the preconditions for filing suit involving claims under $1,000. Before instituting claims for such money damages a claimant was required to either have received the required final agency action (2675 (a)), or alternatively submit a fifteen day written notice of withdrawal of the claim (2675 (b)). In either case a document would be available to demonstrate statutory compliance - either a copy of the final agency denial or else the written withdrawal notice. It is reasonable that Congress did not intend a particular procedural trap for those unversed in the law by the language of section 2675 (a) but instead intended that the fact of withdrawal from the agency and/or final agency action be evidenced to the court. Recall the statement by the Congressional Committee Report rejecting pleas by various federal agencies for retaining the shorter (one year F.T.C.A.) statute of limitations, "No clear distinction can be seen between the accessibility of defenses to the Government than to ordinary law or private defendants." (1949 WL 1677, p.5) That statement explicitly rejects the concept of "special" treatment for the federal government as defendant.

C: Summary Overview of Changes in the F.T.C.A.

The series of amendments to the Federal Tort Claims Act

produced the following results regarding the statute of limitations and the right to commence actions involving notifications of federal agencies:

1946: Act passed. One year statute of limitation. Claims under $1,000 must be submitted to Federal agency which can settle them. Suit on such claims cannot be brought until notice of final disposition is sent to claimant, who then has been given 6 months from date of mailing notice to file suit if the one year statute of limitations would expire during that six month time period. A claim may be withdrawn by giving 15 days written notice. Other suits may proceed directly to court.

1948: Codification. No major substantive changes. However, the six months period for filing suit on claims under $1,000 now runs either from the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

1949: Statute of limitations changed to 2 years.

1959: The requirement of presentation of a claim to an agency now covers claims up to $2,500 (which also can be determined and thus settled by the agency head). The agency is still required to finally dispose of each claim. The only alternative path into court requires submission of a 15 days' notice in writing of the withdrawal of a claim. Suit may then be filed.

1966: All distinctions between amounts of the claim for purposes of notifying the agency prior to suit eliminated. Now all claims must be notified in writing to a federal agency. The

agency head has expanded power to settle claims. The fifteen day withdrawal procedure was eliminated. If after submission of a written claim, six months have passed and no final action has been taken, the claimant now has the right to sue.

D: The definitions of "Institute" and "Commence" do not support identical treatment of RCRA and F.T.C.A.

The dictionary definitions of the words institute and commence are consistent with Congress intending a different meaning to be given to the two words in the F.T.C.A. and in RCRA.

Websters Seventh New Collegiate Dictionary (1971) defines the verbs commence and institute as follows:

Institute 1: to establish in a position or office 2 a : to originate and get established : ORGANIZE b : INAUGURATE, INITIATE

Commence (verb transitive) 1 : to enter upon : BEGIN 2 : to initiate formally by performing the first act of (verb intransitive) 1 : to have a beginning : START 2 : chiefly Brit.: to begin to be or to act as 3 : chiefly Brit. : to take a degree at a university (syn) see BEGIN

The terms are not identical, albeit they are similar, as illustrated by the reference to "initiate" in both definitions. However, the reference to "finally initiate" in the definition of commence captures the precise use of "commence" in the Federal Rules of Civil Procedure, and as construed in Hallstrom. However, such a reference does not occur with respect to "Institute" the language of F.T.C.A. section 2675.

There is a significant difference between such "final initiation" i.e. filing of a complaint, and the looser requirements of "to originate and get established, organize, inaugurate, initiate." Commence implies a more precise point of

time than does institute. To organize, except for the simplest process, involves a period of time, ofttimes a prolonged period of time. For example, the invasion of Nazi dominated France "commenced" on D-Day, however, it makes sense to assert that it was instituted months or years earlier by the planning process and the process of bringing men and material together to "commence" the physical landings on the beaches from ships or behind the coast through parachutes and gliders. Similarly, it is proper usage to describe the resupply of ammunition and other goods after D-Day prior to the break out of the beach fronts as part of the "institution" of the invasion of Nazi occupied France. One could not say, however, that such resupply "commenced" the invasion.

Conclusion

Wherefore the Plaintiff-Appellant respectfully requests that this court rehear this case and suggests a rehearing en banc.

Respectfully submitted,

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May 27, 1992

Appendix of Statutes At Large, Public Laws, and U.S.C.A Sections

60 Stat. 843, (August 2, 1946) (79th Cong. 2nd sess). . . . . A - 2

Section 410 (b), 60 Stat. 844 (Aug. 2 1946) (79th Cong. 2nd sess) . . . . . A - 3

Section 420, 60 Stat. 845 (August 2, 1946) (79th Cong. 2nd sess). . . . . A - 4

62 Stat. 971 (June 25, 1948) (80th Cong. 2nd sess). . A - 5

62 Stat. 983, (June 25, 1948) (80th Cong. 2nd sess). . A - 6

63 Stat. 62 (May 6, 1949) (81st Cong. 1st sess.). . . A - 7

63 Stat. 107 (May 24, 1949) (81st Cong. 1st sess) . . A - 8

Pub.L. 86-238, 73 Stat. 472 (Sept 8, 1959) (86th Cong. 1st sess.) . . . . . A - 9

Pub. L. 89-506, 80 Stat. 306, (July 18, 1966) (89th Cong. 2nd sess) . . . . . A - 10

Pub. L. 89-506, 80 Stat. 307, (July 18, 1966) (89th Cong. 2nd sess) . . . . . A - 11

28 U.S.C. Section 2675 (1992 pocket part, U.S.C.A.) . . A - 12

28 U.S.C. Section 2675 (U.S.C.A. 1965) . . . . . A - 13

42 U.S.C. Section 6972 (b) . . . . . A - 14

Nonapplicability.

of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation; nor to any public official acting in his official capacity; nor in the case of any newspaper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical) which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual, engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

Compilation and printing of information.

(b) All information required to be filed under the provisions of this section with the Clerk of the House of Representatives and the Secretary of the Senate shall be compiled by said Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record.

REPORTS AND STATEMENTS TO BE MADE UNDER OATH

SEC. 309. All reports and statements required under this title shall be made under oath, before an officer authorized by law to administer oaths.

PENALTIES

SEC. 310. (a) Any person who violates any of the provisions of this title, shall, upon conviction, be guilty of a misdemeanor, and shall be punished by a fine of not more than $5,000 or imprisonment for not more than twelve months, or by both such fine and imprisonment.

(b) In addition to the penalties provided for in subsection (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

EXEMPTION

43 Stat. 1070. 2 U. S. C. §§ 241-256. Supp. V, § 251; 18 U. S. C. § 206.

SEC. 311. The provisions of this title shall not apply to practices or activities regulated by the Federal Corrupt Practices Act nor be construed as repealing any portion of said Federal Corrupt Practices Act.

TITLE IV—FEDERAL TORT CLAIMS ACT

PART 1—SHORT TITLE AND DEFINITIONS

SHORT TITLE

SEC. 401. This title may be cited as the "Federal Tort Claims Act".

DEFINITIONS

SEC. 402. As used in this title, the term—

(a) "Federal agency" includes the executive departments and independent establishments of the United States, and corporations

whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: *Provided*, That this shall not be construed to include any contractor with the United States.

Contractor.

(b) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

PART 2—ADMINISTRATIVE ADJUSTMENT OF TORT CLAIMS AGAINST THE UNITED STATES

CLAIMS OF $1,000 OR LESS

SEC. 403. (a) Subject to the limitations of this title, authority is hereby conferred upon the head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, to consider, ascertain, adjust, determine, and settle any claim against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed $1,000, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where the act or omission occurred.

Finality of award.

(b) Subject to the provisions of part 3 of this title, any such award or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud, notwithstanding any other provision of law to the contrary.

Payments.

(c) Any award made to any claimant pursuant to this section, and any award, compromise, or settlement of any claim cognizable under this title made by the Attorney General pursuant to section 413, shall be paid by the head of the Federal agency concerned out of appropriations that may be made therefor, which appropriations are hereby authorized.

Appropriations authorized.

Release of claim.

(d) The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release by the claimant of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

REPORT

SEC. 404. The head of each Federal agency shall annually make a report to the Congress of all claims paid by such Federal agency under this part. Such report shall include the name of each claimant, a statement of the amount claimed and the amount awarded, and a brief description of the claim.

PART 3—SUITS ON TORT CLAIMS AGAINST THE UNITED STATES

JURISDICTION

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the

United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

Liability of U. S.

Costs.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: *Provided*, That the claimant may, upon fifteen days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: *Provided further*, That as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of the claim. Disposition of any claim made pursuant to part 2 of this title shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

Judgment as bar to action against employee of Government.

Withdrawal of claim.

PROCEDURE

SEC. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505).

28 U. S. C. §§ 723b, 723c; Supp. V, § 723c.

28 U. S. C. §§ 230 note, 216 note, 761-768.

REVIEW

SEC. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal—

(1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; or

(2) in the Court of Claims of the United States: *Provided*, That the notice of appeal filed in the district court under rule 73 of the Rules of Civil Procedure shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. Such appeals to the Court of Claims of the United States shall be taken within

Circuit courts of appeal.

Court of Claims.

28 U. S. C. foll. § 723c.

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three months after the entry of the judgment of the district court, and shall be governed by the rules relating to appeals from a district court to a circuit court of appeals adopted by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064). In such appeals the Court of Claims of the United States shall have the same powers and duties as those conferred on a circuit court of appeals in respect to appeals under section 4 of the Act of February 13, 1925 (43 Stat. 939).

28 U. S. C. §§ 723b, 723c; Supp. V, § 723c.

28 U. S. C. § 225.

(b) Sections 239 and 240 of the Judicial Code, as amended, shall apply to cases under this part in the circuit courts of appeals and in the Court of Claims of the United States to the same extent as to cases in a circuit court of appeals therein referred to.

28 Stat. 1127; 28 U. S. C. §§ 346, 347.

COMPROMISE

SEC. 413. With a view to doing substantial justice, the Attorney General is authorized to arbitrate, compromise, or settle any claim cognizable under this part, after the institution of any suit thereon, with the approval of the court in which such suit is pending.

PART 4—PROVISIONS COMMON TO PART 2 AND PART 3

ONE-YEAR STATUTE OF LIMITATIONS

SEC. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

EXCEPTIONS

SEC. 421. The provisions of this title shall not apply to—

Act, etc., in execution of statute.

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

Loss of letters, etc.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

Assessment of tax, etc.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

Suits in admiralty.

41 Stat. 523; 46 U. S. C., Supp. V, § 741. 43 Stat. 1112.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U. S. C., title 46, secs. 741-752, inclusive), or the Act of March 3, 1925 (U. S. C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

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service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

§ 2672. Administrative adjustment of claims of $1,000 or less

The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Finality of award.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award or determination shall be final and conclusive on all officers of the government, except when procured by means of fraud.

Post, p. 984.

Any award made pursuant to this section, and any award, compromise, or settlement made by the Attorney General pursuant to section 2673 of this title, shall be paid by the head of the federal agency concerned out of such agency's appropriations therefor, which appropriations are hereby authorized.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 2673. Reports to Congress

Supra.

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.

(b) The claimant, however, may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and

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[CHAPTER 92]

AN ACT

April 25, 1949 (H. R. 779) [Public Law 53]

To amend title 28 of the United States Code to provide additional time for bringing suit against the United States in the case of certain tort claims, and for other purposes.

Title 28, United States Code, amendments. 62 Stat. 971. 28 U. S. C., Supp. II, § 2401 (b).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of section 2401 (b) of title 28 of the United States Code is hereby amended to read as follows: "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later."

62 Stat. 933. 28 U. S. C., Supp. II, § 1346 (b). Post, p. 101. 62 Stat. 982. 28 U. S. C., Supp. II, §§ 2671-2680. Post, pp. 104, 107, 444.

SEC. 2. (a) Section 1346 (b) of title 28 of the United States Code is hereby amended to read as follows:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

62 Stat. 963. 28 U. S. C., Supp. II, § 2672. Post, p. 106.

(b) The first paragraph of section 2672 of title 28 of the United States Code is hereby amended to read as follows:

"The head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Approved April 25, 1949.

[CHAPTER 93]

AN ACT

May 6, 1949 (H. R. 4152) [Public Law 56]

To approve repayment contracts negotiated with the Bitter Root irrigation district, the Shasta View irrigation district, the Okanogan irrigation district, the Willwood irrigation district, the Uncompahgre Valley Water Users Association, and the Kittitas reclamation district, to authorize their execution, and for other purposes.

Irrigation districts. Approval of repayment contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the contracts referred to in sections 2 to 7, inclusive, of this Act, which have been negotiated by the Secretary of the Interior and reported on as provided in subsections (a) and (c) of section 7 of the Reclamation Project Act of 1939 (53 Stat. 1187), are hereby approved and the

53 Stat. 1192. 43 U. S. C. § 485f (a), (c).

62 Stat. 764. 28 U. S. C., Supp. II, § 2673 (b).

SEC. 126. The second sentence of subsection (b) of section 2673 of title 28, United States Code, is amended by striking out the word "subsection" appearing therein and inserting in lieu thereof the word "section".

28 U. S. C., Supp. II, § 451 note.

SEC. 127. Section 32 of the Act of June 25, 1948, chapter 646, 62 Stat. 991, is amended to read as follows:

"SEC. 32. (a) All laws of the United States in force on September 1, 1948, in which reference is made to a 'circuit court of appeals'; 'senior circuit judge'; 'senior district judge'; 'presiding judge': 'chief justice', except when reference to the Chief Justice of the United States is intended: or 'justice', except when used with respect to a justice of the Supreme Court of the United States in his capacity as such or as a circuit justice, are hereby amended by substituting 'court of appeals' for 'circuit court of appeals'; 'chief judge of the circuit' for 'senior circuit judge'; 'chief judge of the district court' for 'senior district judge'; 'chief judge' for 'presiding judge'; 'chief judge' for 'chief justice', except when reference to the Chief Justice of the United States is intended; and 'judge' for 'justice', except when the latter term is used with respect to a justice of the Supreme Court of the United States in his capacity as such or as a circuit justice.

"(b) All laws of the United States in force on September 1, 1948, in which reference is made to the Supreme Court of the District of Columbia or to the District Court of the United States for the District of Columbia are amended by substituting 'United States District Court for the District of Columbia' for such designations.

"(c) All laws of the United States in force on September 1, 1948, in which reference is made to the 'Conference of Senior Circuit Judges', or to the 'Judicial Conference of Senior Circuit Judges' are amended by substituting 'Judicial Conference of the United States' for such designations.

"(d) This section shall not be construed to amend historical references to courts or judicial offices which have no present or future application to such courts or offices.".

53 Stat. 164. 26 U. S. C., Supp. II, § 1141 (a).

SEC. 128. Subsection (a) of section 1141 of the Internal Revenue Code (26 U. S. C., sec. 1141 (a)), as amended, is amended by striking out the words "circuit courts of appeals and the United States Court of Appeals for the District of Columbia", appearing in such subsection, and substituting in lieu thereof "courts of appeals".

61 Stat. 643. 4 U. S. C., Supp. II, prec. § 101.

SEC. 129. (a) The analysis of chapter 4, immediately preceding section 101 of title 4 of the United States Code, entitled, "Flag and Seal, Seat of Government, and the States", is amended by inserting, immediately after and below item 110, the following new item:

"111. Compacts between States for cooperation in prevention of crime; consent of Congress.".

61 Stat. 643. 4 U. S. C., Supp. II, § 110.

(b) Such title 4 of the United States Code is further amended by inserting, immediately following section 110, a new section, as follows:

"§ 111. Compacts between States for cooperation in prevention of crime; consent of Congress

"The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.".

SEC. 130. Clause (1) of subdivision c of section 14 of the Act of July 1, 1898 (ch. 541, 30 Stat. 550; 11 U. S. C., sec. 32, subd. c. cl. (1)), as

28 U S C 2671-2680.

(2) The analysis of chapter 171 is amended by striking out the following item:

"2672. Administrative adjustment of claims of $1,000 or less."

and by inserting the following item in place thereof:

"2672. Administrative adjustment of claims of $2,500 or less."

62 Stat. 971.

(3) Subsection (b) of section 2401 of title 28, United States Code, is amended by striking out "$1,000" wherever it appears in such subsection, and by inserting in lieu thereof "$2,500".

Approved September 8, 1959.

Public Law 86-239

AN ACT

September 8, 1959 (H. R. 7373)

To amend section 801 of title 38, United States Code, to provide assistance in acquiring specially adapted housing to an additional group of severely disabled veterans.

Veterans, Housing grants for disabled. 72 Stat. 1168.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 801 of title 38, United States Code is amended to read as follows:

"§ 801. Veterans eligible for assistance

"The Administrator is authorized, under such regulations as he may prescribe, to assist any veteran, who is entitled to compensation under chapter 11 of this title, based on service after April 20, 1898, for permanent and total service-connected disability—

"(1) due to the loss, or loss of use, of both lower extremities, such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair, or

"(2) which includes (A) blindness in both eyes, having only light perception, plus (B) loss or loss of use of one lower extremity, and such permanent and total disability is such as to preclude locomotion without the aid of a wheelchair,

in acquiring a suitable housing unit with special fixtures or movable facilities made necessary by the nature of the veteran's disability, and necessary land therefor. The regulations of the Administrator shall include, but not be limited to, provisions requiring findings that (1) it is medically feasible for such veteran to reside in the proposed housing unit and in the proposed locality; (2) the proposed housing unit bears a proper relation to the veteran's present and anticipated income and expenses; and (3) the nature and condition of the proposed housing unit are such as to be suitable to the veteran's needs for dwelling purposes."

Approved September 8, 1959.

Public Law 86-240

AN ACT

September 9, 1959 (S. 669)

To authorize the Secretary of Agriculture to convey certain lands to the Bethel Baptist Church of Henderson, Tennessee.

Bethel Baptist Church, Tenn. Conveyance. 50 Stat. 525-533. 7 USC 1010-1012, 1014-1029 passim.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, (a) notwithstanding the provisions of title III and title IV of the Bankhead-Jones Farm Tenant Act, the Secretary of Agriculture is authorized and directed to convey to the Bethel Baptist Church, Henderson, Tennessee, by quitclaim deed all right, title, and interest of the United

Public Law 89-506

July 18, 1966
[H. R. 13650]

AN ACT

To amend the Federal Tort Claims Act to authorize increased agency consideration of tort claims against the Government, and for other purposes.

Federal Tort Claims Act, amendment.
63 Stat. 62; 73 Stat. 471.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, (a) That the first paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

"The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee."

Finality of award.
62 Stat. 983.

(b) The second paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

"Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud."

Payment of award.

(c) The third paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

"Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter."

Disposition by Federal agency as prerequisite.

SEC. 2. (a) Subsection (a) of section 2675 of title 28, United States Code, is amended to read as follows:

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim."

28 USC app.

(b) Subsection (b) of section 2675 of title 28, United States Code, is amended by deleting the first sentence thereof.

Compromise.
62 Stat. 984.
63 Stat. 62.

SEC. 3. Section 2677 of title 28, United States Code, is amended to read as follows:

"The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon."

Attorney fees, penalty.
28 USC 2678.

SEC. 4. The first paragraph of section 2678 of title 28, United States Code, is amended to read as follows:

"No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title."

Ante, p. 306.

Exclusiveness of remedy.

SEC. 5. (a) Subsection (b) of section 2679 of title 28, United States Code, is amended to read as follows:

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

Certain malpractice and negligence suits.
79 Stat. 1156.

(b) Subsection (a) of section 4116 of title 38, United States Code, is amended to read as follows:

"(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death allegedly arising from malpractice or negligence of a physician, dentist, nurse, pharmacist, or paramedical (for example, medical and dental technicians, nursing assistants, and therapists) or other supporting personnel in furnishing medical care or treatment while in the exercise of his duties in or for the Department of Medicine and Surgery shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or his estate) whose act or omission gave rise to such claim."

Judgments and compromise settlements against U.S., appropriations.

SEC. 6. Section 1302 of the Act of July 27, 1956, as amended (70 Stat. 694, 75 Stat. 416; 31 U.S.C. 724a), is further amended (1) by inserting a comma and the word "awards," after the word "judgments" and before the word "and"; (2) by deleting the word "or" after the number "2414" and inserting in lieu thereof a comma; and (3) by inserting after the number "2517" the phrase ", 2672, or 2677".

Time for commencing action.

SEC. 7. Subsection (b) of section 2401 of title 28, United States Code, is amended to read as follows:

"(b) a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

"Federal agency."

SEC. 8. The first sentence of section 2671 of title 28, United States Code, is amended to read as follows: "As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States."

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

(As amended July 18, 1966, Pub.L. 89-506, § 2, 80 Stat. 306.)

HISTORICAL AND STATUTORY NOTES

1966 Amendment

Subsec. (a). Pub.L. 89-506, § 2(a), required that all administrative claims be filed with the agency or department and finally denied by the agency and sent by certified or registered mail prior to the filing of a court action against the United States, provided that the claimant be given the option of considering the claim to have been denied if the agency fails to make final disposition of the claim within six months of presentation of the claim to the agency, and provided that the requirements of the subsection would not apply to claims asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

Subsec. (b). Pub.L. 89-506, § 2(b), deleted provisions under which a claimant could, upon 15 days written notice, withdraw a claim from the agency and institute an action thereon.

Effective Date of 1966 Amendment

Amendment of section by Pub.L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub.L. 89-506, set out as a note under section 2672 of this title.

Legislative History

For legislative history and purpose of Pub.L. 89-506, see 1966 U.S. Code Cong. and Adm. News, p. 2515.

FEDERAL PRACTICE AND PROCEDURE

Exceptions to sovereign immunity, see Wright, Miller & Cooper: Jurisdiction § 3656 et seq.

Joinder of individuals as codefendants with United States, see Wright & Miller: Civil § 1658.

Severance of claims under rule pertaining to misjoinder and non-joinder of parties, see Wright & Miller: Civil § 1689.

WEST'S FEDERAL FORMS

Complaint for negligence—
- Generally, see § 1777 and Comment thereunder.
- Injuries to child who pulled mailbox over on himself, see § 1781.
- Liability of Federal Aviation Administration in arranging for publication of inaccurate charts, see § 1603.1 and Comment thereunder.

Operations performed in Veterans' Administration hospital, see § 1779.

WEST'S FEDERAL PRACTICE MANUAL

Claims against Postal Service, see § 2564
Procedure, see § 2003 et seq.

CODE OF FEDERAL REGULATIONS

Claims against United States, generally, see 32 CFR 536.1 et seq.

LAW REVIEW COMMENTARIES

Federal tort claims at the agency level: The FTCA administrative process. George A. Bermann. 35 Case W.Res.L.Rev. 509 (1984-85).

United States v. Varig: Can the King only do little wrongs? Thomas H. (Speedy) Rice (1983) 22 C.W.L.R. 175.

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Section 1346 of this the United States wi with this section mean tive remedies a prem van v. U.S., D.C.W.

1. Construction

Statute which mak Claims Act (FTCA) a against the United S presents his claim to and claim is denied Meridian Intern. Ltd. (Cal.) 1991, 939 F.2d

Requirement that appropriate federal ag by that agency before against United States tion 1346(b) of this cannot be waived

IN THE UNITED STATES
SUPREME COURT
OCTOBER TERM, 1992

NO:

WILLIAM McNEIL,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

CERTIFICATE OF SERVICE

I, ALLEN E. SHOENBERGER, DO HEREBY CERTIFY
THIS DAY MAILED COPIES OF THE PETITION FOR CERTIORARI AND
FOR LEAVE TO APPEAL IN FORMA PAUPERIS IN THIS CASE TO:

THE SOLICITOR GENERAL OF THE UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

Eileen M. Marutsky, AUSA
Office of the United States Attorney
Criminal Division
219 S. Dearborn St.,
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postage prepaid.

September 18, 1992.

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No. 92-6033

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLIAM MCNEIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court may entertain an action under the Federal Tort Claims Act filed before the plaintiff seeks relief from the defendant agency, as required by 28 U.S.C. 2675(a), if the plaintiff subsequently seeks relief.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B3) is reported at 964 F.2d 647. The opinion of the district court (Pet. App. A1-A7) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1992. A timely petition for rehearing was denied on June 26, 1992. See Pet. App. B1. The petition for a writ of certiorari was filed on September 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a state prisoner in Illinois. On March 6, 1989, he filed this action, contending that the prison had compelled him to participate in experiments conducted or financed by the United States Public Health Service. Petitioner alleged that in one of those experiments he was required to share a cell with another prisoner who had AIDS and that he contracted hepatitis as a result of the experiments. Petitioner alleged that the United States was liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, and requested $20 million in damages. Pet. App. A1; B1.

Although 28 U.S.C. 2675(a) bars a person from filing suit under the FTCA "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing," petitioner did not present his claim to the Public Health Service (or any other federal agency) before he filed suit. Instead, on July 7, 1989, four months after he had filed suit, he filed an administrative claim with the Department of Health and Human Services (HHS). HHS denied the claim on July 21, 1989. Pet. App. A2-A3; B1-B2.

2. The district court dismissed the suit for lack of jurisdiction because petitioner had not "first presented his claim" to the agency before filing his complaint. Pet. App. A1-A7. The court stated that the FTCA is a waiver of the federal government's sovereign immunity and thus "must be strictly

construed." Id. at A6. The court rejected the contrary view of the Eighth Circuit in Celestine v. Veterans Administration Hospital, 746 F.2d 1360, 1363 (1984), where the court entertained a complaint filed before completion of the administrative claims process. Instead, the court followed the analysis adopted by the Fifth Circuit in Reynolds v. United States, 748 F.2d 291, 292 (1984) (no jurisdiction over suit filed after seeking administrative review, but before action by agency). Pet. App. 4-6.

3. A divided panel of the court of appeals affirmed. Pet. App. B1-3. The court noted the holdings of the Eighth Circuit in Celestine and the Third Circuit in Kubrick v. United States, 581 F.2d 1092, 1098 (1978), rev'd on other grounds, 444 U.S. 111 (1979), which would allow FTCA suits to proceed if the administrative claim is denied before any substantial progress is made in the suit, but rejected those holdings as contrary to the plain language of the statute. The court noted that neither decision "discussed the language of § 2675(a)" or "explain[ed] why the statute Congress actually enacted may be disregarded." Pet. App. B2.[1/]

[1/] The panel declined to consider whether a letter petitioner had written to the district court after exhausting administrative remedies was adequate to constitute a separate complaint, noting that petitioner "did not characterize the letter as a complaint in the district court (where he represented himself) or here (where a professor of the Loyola School of Law is serving as his counsel)." Pet. App. B3. Judge Ripple dissented on that point, concluding that the letter in question, considered in light of petitioner's status as a prisoner proceeding pro se, was adequate to constitute a separate complaint. Ibid. In a footnote, Judge Ripple noted that he "respectfully differ[ed] with [his] colleagues as to whether [petitioner] raised this issue adequately." Id. at B3 n.1. Petitioner does not present that question in the petition.

ARGUMENT

1. Petitioner argues (Pet. 4-7) that the court of appeals erred in holding that 28 U.S.C. 2675(a) bars district courts from entertaining FTCA actions when the plaintiff exhausts administrative remedies after filing suit, but before substantial progress on the merits of the suit.

The Federal Tort Claims Act, 28 U.S.C. 1346, 2671-2680, waives the sovereign immunity of the United States for certain tort actions. As a condition to this waiver of immunity, the FTCA provides:

> An action shall not be instituted upon a claim against the United States [under the FTCA] unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing * * * . The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant at any time thereafter, be deemed a final denial of the claim for purposes of this section.

28 U.S.C. 2675(a). As the Fifth Circuit has recognized, this requirement is "entirely unambiguous," Reynolds v. United States, 748 F.2d 291, 292 (5th Cir. 1984). A tort claimant "shall not" commence proceedings in court against the United States without first filing the claim with the appropriate federal agency and either receiving a conclusive denial or waiting for six months to elapse without a final disposition. It is undisputed that petitioner did not comply with those requirements: petitioner filed this action in the district court on March 6, 1989, Pet.

2., but did not file a claim with the administrative agency until July 7, 1989, Pet. 3.[2]

Petitioner contends, however (Pet. 6-7), that courts should entertain this suit in the face of petitioner's failure to comply with those requirements, invoking what he perceives to be the "[a]pparent injustice to F.T.C.A. plaintiffs" caused by the decision of the court of appeals. The court of appeals correctly recognized, however, that it was not free to vary the explicit jurisdictional requirements established by Congress, particularly when the jurisdictional requirements are conditions on a waiver of the sovereign immunity of the United States. Compare Hallstrom, 493 U.S. at 28-29 (rejecting similar arguments). As this Court has explained, the FTCA "waives the immunity of the United States," and in construing the conditions of that waiver, the Court has been reluctant to "take it upon ourselves to extend the waiver beyond that which Congress intended." 444 U.S. 111, 117-18 (1979). Thus, the Court's "decisions have interpreted the Act to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions." Dalehite v. United States, 346 U.S. 15, 31 (1953).

This Court has made it clear -- even in suits involving private parties -- that a statute that requires a plaintiff to give notice of a claim to an agency as a condition to filing suit in federal court cannot be construed to allow the plaintiff to

---

[2] As noted above, the claim was denied by HHS only two weeks after petitioner filed it.

"file suit before fulfilling the * * * requirement," because the courts "are not at liberty to create an exception where Congress has declined to do so." Hallstrom v. Tillamook County, 493 U.S. 20, 26-27 (1989). The language at issue in Hallstrom -- which provided that "[n]o action may be commenced" until the required notice had been given -- is substantively indistinguishable from the language at issue here -- which provides that "[a]n action shall not be instituted" until the plaintiff seeks recourse from the agency. Accordingly, the result reached in Hallstrom should follow a fortiori in this case because it involves a statute that waives the sovereign immunity of the United States.

The construction urged by petitioner is inconsistent not only with the language of the statute, but with the policies that moved Congress to enact it. As the Senate Report explained, Congress made filing of an administrative claim a prerequisite to an FTCA suit "to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966).[3] The Senate Report goes on to explain that the amendment would streamline the process by making the agencies the initial arbiters of federal tort claims; because the agency whose activity is alleged to have caused the harm "would have the best

[3] See Douglas v. United States, 658 F.2d 445, 447 (6th Cir. 1981) ("[t]he compulsory administrative claim procedure in the amended FTCA was established to reduce congestion of federal courts' dockets and to speed fair treatment of those asserting claims against the federal government").

information concerning the activity [and] is the one directly concerned, it can be expected that claims which are found to be meritorious can be settled more quickly without the need for filing suit and possible expensive and time-consuming litigation." Id. at 3. To the extent the procedures were modeled on municipal procedures designed "to protect the municipality from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit," id. at 4, the purpose of the legislation would be defeated if petitioner were able to circumvent the presentment process and proceed directly to federal court. In light of the plain language of Section 2675(a), and the reasons for its enactment, petitioner's argument should be rejected.

2. Petitioner correctly notes that the courts of appeals have reached conflicting results on the question. The Eighth Circuit has adopted the rule urged by petitioner. Celestine v. Veterans Administration Hospital, 746 F.2d 1360, 1363 (1984).[4] On the other hand, the Seventh Circuit's decision in this case follows the analysis adopted by the Fifth Circuit in Gregory v. Mitchell, 634 F.2d 199, 204 (1981), and Reynolds v. United States, 748 F.2d 291, 292 (5th Cir. 1984). Moreover, the Ninth Circuit recently has joined the majority position, rejecting

[4] The Third Circuit also adopted that rule in Kubrick v. United States, 581 F.2d 1092, 1098 (1978), but this Court reversed the decision on other grounds, United States v. Kubrick, 444 U.S. 111 (1979). Because the Third Circuit has not revisited the issue during the intervening years, it is possible that it might withdraw from the analysis it articulated in Kubrick.

Celestine in Jerves v. United States, 966 F.2d 517, 521 (1992). The decision of the court of appeals also is consistent with the views of the Fourth Circuit, which has stated that the requirements of Section 2675(a) are jurisdictional, a view that is, at best, in tension with the conclusion of the Eighth Circuit in Celestine. Plyler v. United States, 900 F.2d 41, 42 (4th Cir. 1990).

Nevertheless, we do not believe that the issue demands review at this time, because there is a significant likelihood that the conflict will be resolved without intervention by this Court. As the court of appeals noted, the Eighth Circuit's decision in Celestine has no independent analysis of the language of the statute, but relies wholly on the decision of the Third Circuit in Kubrick v. United States, 581 F.2d 1092, 1098 (1978). Kubrick itself similarly contains no analysis of the statute; indeed, the opinion does not even quote the language. Moreover, because this Court reversed Kubrick on other grounds in United States v. Kubrick, 444 U.S. 111 (1979), the decision of the court of appeals in that case has only questionable precedential value. In light of the consistent trend of decisions by the Fifth, Seventh and Ninth Circuits, and this Court's analysis of a strikingly similar statute in Hallstrom, we believe that the Eighth Circuit would be likely to reconsider its position in an appropriate case. In our view, a decision declining to do so, and holding against the government on the basis of Celestine, would warrant summary reversal in light of Hallstrom. Accordingly, we do not believe plenary review is necessary at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1992

Supreme Court, U.S.
FILED
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No. 92-6033

In The

Supreme Court of the United States

October Term, 1992

WILLIAM MCNEIL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed September 21, 1992
Certiorari Granted January 15, 1993

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RELEVANT DOCKET ENTRIES

United States District Court,
Northern District of Illinois

3/9/89	Received 03/06/89: Complaint and four copies Filed 03/06/89: Application to proceed in forma pauperis, supporting documentation.
	Forwarded 03/09/89 to Judge Alesia: entire case file.
06/13/89	Minute order of 6/12/89: Ruling on plaintiff's motion for leave to file in forma pauperis is held in abeyance pending further order of court. Alesia, J.
8/25/89	Filed 8/19/89: Plaintiff's affidavit in support of motion for appointment of counsel; (Attachments)
4/25/90	Filed 5/15/90: Copy of receipt for payment of filing fee. (Temporarily unavailable for docketing.)
4/24/90	Minute order of 4/20/90. Plaintiff's motion for leave to file in forma paureris (sic) is denied as moot since (sic) has paid the filing fee. The Clerk is directed to issue summons for service of the complaint upon defendant. Pursuant to Rule 4(c)(2)(B)(iii) of the Federal Rules of Civil Procedure, the court orders the United States Marshal to effect service in this action. Service by a United States Marshal is necessary because plaintiff is incarcerated and proceeding pro se. The Clerk is directed to send a copy of this order to the United States Marshal.

Filed 5/15/90: Complaint.

8/7/90 Filed 8/6/90: U.S. Marshal's return of service of summons and complaint executed as to the U.S. Department of Health and Human Services on 7/30/90.

8/29/90 Filed 8/28/90: Defendant's ANSWER.

9/20/90 Filed 9/19/90: Defendant's motion to dismiss. Plaintiff's (sic) memorandum in support of defendant's motion to dismiss.

10/9/90 Memorandum in opposition by plaintiff to the defendant's motion to dismiss (Attachments).

10/30/90 REPLY MEMORANDUM of Defendant in support of motion to dismiss.

1/24/91 ENTERED JUDGMENT; The court finds that it lacks subject matter jurisdiction over this action. The defendant United States Public Health Service's motion to dismiss is granted. . . .

2/5/91 NOTICE OF APPEAL by Plaintiff William McNeil.

2/22/91 Motion by Plaintiff for leave to file an appeal in forma pauperis (Attachments)

3/13/91 MINUTE ORDER of 3/13/91 before Honorable James H. Alesia: The court grants plaintiff's motion for leave to appeal in forma pauperis.

7/6/92 CERTIFIED COPY of order from the USCA for the 7th Circuit entered 5/20/92: It is ordered and adjudged by this court that the judgment of the District Court is affirmed, with costs, in accordance with the decision of this court.

IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM MC' NEIL
PLAINTIFF
-VS-
THE UNITED STATES
PUBLIC HEALTH SERVICE
DEFENDANTS

CIVIL ACTION
89C1822
Filed
March 9, 1989

STRICT TORT LIABILITY

1. THE PLAINTIFF WILLIAM MC'NEIL (PRO. SE.) AND MOVES THIS HONORABLE COURT UNDER LIABILITY OF THIS UNITED STATES FEDERAL TORT CLAIM ACTS 1346, 2671, 2680, FOR THE DAMAGES CAUSED BY SAID DEFENDANTS CONDUCTING HUMAN RESEARCH AND EXPERIMENTATION ON PRISONERS WITHIN THE ILLINOIS DEPARTMENT OF CORRECTION WITHOUT THE PLAINTIFF (INFORMED CONSENT) WHO IS A FORCED SUBJECT IN SAID EXPERIMENTS ON THE SPREAD OF INFECTIOUS DISEASES, THE PLAINTIFF WILLIAM MC' NEIL IS A PRISONER AT THE STATEVILLE CORRECTIONAL CENTER LOCATED IN THE IN THE [sic] STATE OF ILLINOIS.

THE DEFENDANTS UNITED PUBLIC HEALTH SERVICE, THIS GOVERNMENTAL AGENCY WAS ORGANIZED AND EXIST PURSUANT TO LAWS INACTED [sic] BY THE UNITED STATES CONGRESS, WITH THE PRINCIPLE PLACE OF BUSINESS AT THE GENERAL

COUNSEL OFFICE, FOOD& DRUG DIVISION, ROCKVILLE MD. 20855 CHIEF COUNSEL THOMAS SCARLETT NO.F 88-35196.

THE DEFENDANTS ARE FULLY AWARE OF THE STAKES IN PRISON RESEARCH ARE HIGH WITH THE DEFENDANTS ACCESS TO PRISON, CAN OBTAIN HEALTHY HUMANS SUBJECTS LIVING IN TOTAL CONTROLLED CONDITIONS THAT ARE DIFFICULT IF NOT IMPOSSIBLE TO DUPLICATE ELSEWHERE.

IN ADDITION THE STAFF IS FORCING KNOWN AIDS CARRIERS TO CELL WITH OTHER INMATES. THE DEFENDANTS ARE CONDUCTING EXPERIMENTS ON PRISONERS THAT WOULD NOT BE SANCTIONED FOR ANY PRICE BECAUSE OF THE DEGREE OF RISK, STRESS AND PAIN INVOLVED

THE DEFENDANTS ARE FULLY AWARE OF THE GUIDELINES FOR HUMAN EXPERIMENTATION ESTABLISHED BY HEW AND OTHER FEDERAL AGENCIES, FDA REGULATION PROHIBITED ANY TYPE OF EXPERIMENTATION ON PRISONERS. THE DEFENDANT WAS VERY KNOWLEDGEABLE OF THEIR ACTS.

2. THE PLAINTIFF IS A RESIDENT PRISONER OF THE STATE OF ILLINOIS AND THE DEFENDANTS THE UNITED STATES PUBLIC HEALTH SERVICE, HAS CONSENTED TO THIS ACTION WITH ITS PRINCIPAL PLACE OF BUSINESS IN THE STATE OF MARYLAND.

3. THE JURISDICTION OF THIS COURT IS BASED ON CONSENT FROM THE UNITED STATES AGENCY AND DIVERSITY OF CITIZEN SHIP, AND THE AMOUNT OF

CONTROVERSY EXCEEDS THE SUM OF 10,000.00 EXCLUSIVE OF INTEREST AND COST.

4. AT ALL TIMES HERE IN MENTIONED THE DEFENDANTS WAS [sic] ENGAGED IN HUMAN EXPERIMENTATION AT THE STATEVILLE CORRECTIONAL CENTER, CONDUCTING RESEARCH ON THE SPREAD OF INFECTIOUS DISEASES.

5. AS THE DIRECT AND PROXIMATE RESULT OF THE CARELESS AND NEGLIGENCE OF THE DEFENDANTS BY PURPOSELY EXPOS ING [sic] PLAINTIFF TO INFECTIOUS DISEASES, THE DEFENDANTS NEGLIGENTLY FAILED TO WARN INSTRUCT,ADQUATE [sic] WARN THE PLAINTIFF CONCERNING THE LONG TERM EFFECTS OF EXPOSURE TO THE INFECTIOUS DISEASES.

COUNT 2.

1. THE PLAINTIFF WILLIAM MC'NEIL FOR HIS SECOND CAUSE OF ACTION REPEATS AND REAVERS THE ALLEGATIONS OF PARAGRAPHS 1,2,3,4 AND 4 OF COUNTS I AS WRITTEN AND SET FORTH HEREIN.

UNPROFESSIONAL CONDUCT, THE DEFENDANT WAS CLEARLY KNOWLEDGABLE [sic] OF THE LEGAL AND ETHICAL CONCEPTS FOR HUMAN RESEARCH, THIS LEGAL PROBLEM WAS RESOLVED BY DRAWING A LINE BETWEEN WHAT IS THERAPEUTIC AND NOW THERAPEUTIC RESEARCH BY IMAGINING THIS PLAINTIFF ASKING DOCTOR' ARE YOU EXPOSING ME TO THIS VIRUS FOR ME? OR AM I DOING THIS FOR YOU? IT IS CLEAR IF THE PLAin TIFF) [sic] IS

UNDERGOING A PARTICULAR MEDICAL PROCEDURE NOT FOR HIS OWN BENEFIT BUT FOR THAT OF THE RESEARCH IN THE PURSUIT OF A SCIENTIFIC GOAL. THEN THE RESEARCH PROCEDURE WAS NON THERAPEUTIC, THEREFORE THE EXPOSURE TO THE VIRIS [sic] WAS CLEARLY UNPROFESSIONAL CONDUCT BY THE DEFENDANTS.

COUNT 3.

THE PLAINTIFF WILLIAM MC'NEIL FOR HIS THIRD CAUSES OF ACTION REPEATS AND REVERS THE ALLEGATION OF PARAGRAPHS 1,2,3, AND 4 OF COUNT 1 AS IF EXPRESSLY REWRITTEN AND SET FORTH HEREIN. FRAUD AND DECEIT, IN THE PRACTICE OF MEDICINE BY THE DEFENDANTS, THE LEGAL AND ETHICAL CONCEPT NOW GOVERNING ANY TYPE OF EXPERIMENTATION WITH HUMAN SUBJECTS THERE FORE [sic] THE DEFENDANTS DUTY WAS TO PROTECT PLAINTIFF FROM ANY TYPE OF EXPERIMENT, THE EXPERIMENTATION HERE IN MENTIONED INVOLVED GREAT RISK, THE DEFENDANTS ARE OBSERVING THE SPREAD OF THE DEADLY VIRUS A.I.D.S. AMONG THE PRISONERS WAS INJECTED AS CONTROLLER AND OR DIOGNOSTIC [sic] CARRIERS, IT WAS THE DUTY OF DEFENDANTS TO AT LEAST MAKE SURE THAT EACH PRISONER WAS TOTALLY AWARE OF BEING A VOLUNTEER IN THIS EXPERIMENTATI ON [sic] IT WAS THE DEFENDANTS DUTY TO SUFFICIENTLY INFORMED [sic] THE PRISONER OF THE DANGER OF THIS EXPOSURE AND INFORMED CONSENT FOR THE USE OF THEIR BODIES AND OR ENVIROMENT [sic], AND THIS EXPERIMENT IS NOT THE TREATMENT OF

DIOGNOSIS [sic] OF THE PLAINTIFF OWN CONDITION AT THE START OF THIS EXPERIMENT, LEGALLY THE PRINCIPAL THAT PLAINTIFF SHOULD NOT BE USED IN EXPERIMENTS UNRELATED TO HIS PERSONAL TREATMENT UNLESS PLAINTIFF HAS GIVEN HIS INFORMED CONSENT, THE DEFENDANTS KNEW BY LAW THAT A SUBJECT HAS THE RIGHT TO KNOW HE IS BEING ASKED TO VOLUNTEER OR REFUSE TO PARTICIPATED [sic] IN A EXPERIMENT FOR ANY REASON INTELLIGENT OR OTHERWISE WELL-INFORMED, A PHYSICIAN HAS NOT LEGAL RIGHT TO WITH HOLD FROM PROSPECTIVE VOLUNTEERS TO TAKE THIS RIGHT AWAY FROM THE PLAINTIFF IN THE DESIGN OF THE EXPERIMENT IS CLEARLY A CASE OF FRAUD AND DECIET [sic] IN THE PRACTICE OF MEDICINE THIS EXPERIMENT HAS CLEARLY IMPARED [sic] PLAINTIFF LIFE AND HIS ABILITY TO LEAD A NORMAL LIFE HAS BEEN ADVERSLY [sic] AFFECTED BECAUSE OF THIS EXPERIMENT, PLAINTIFF HAS BEEN FORCED TO EXCEPT CELL-MATE WITH A.I.D.S. AND STILL BEING FORCED. WHEREFORE THE BLAINTIFF [sic] PRAYS JUDGMENT AGAINST THE DEFENDANT UNITED STATES PUBLIC HEALTH SERVICE IN THE SUM OF 20,000,000,000 twenty million dollers [sic]. TOGETHER WITH THE COST AND INTEREST OF THIS ACTION.

PLAINTIFFCLAIMS
TRIAL
BY JURY . . .

RESPECTFULLY SUBMITTED

/s/ WILLIAM MC'NEIL
P.O. BOX 112
JOLIET ILLINOIS 60434

(Logo)
DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service
Food and Drug Administration
Rockville MD 20857

In reply refer to: FOI# F88-35196

February 9, 1989

William McNeil
Attn: William McNeil
P.O. Box 112
Juliet, IL 60434

Concerning your request (copy enclosed) for record(s) from the Food and Drug Administration pursuant to the Freedom of Information Act:

___ The requested record(s) are enclosed.

___ Partial response. Further response will be made.

_X_ To the best of my knowledge, the document(s) requested are not in our files.

___ As you will note, minor deletions of material have been made in the record(s) furnished to you. In the judgment of the Food and Drug Administration the information deleted does not fall within the scope of your request and, in any case, is not required to be disclosed under the Freedom of Information Act.

___ See enclosed comments.

___ Charges will be included in a monthly invoice from the Freedom of Information Staff if your request(s) total more than $10.00 per month; the material is free if your request(s) total less than $10.00 per month. Current rates are:

Reproduction, 10 cents per page _0_ pages

Search Services, $20.00 per hour ___ hours

Sincerely yours,

/s/ Nancy Oleksa
Nancy Oleksa
Freedom of Information Officer
Office of Health Affairs

Enclosures

August 7, 1989

Clerk's Attention:

Honorable James H. Alesia
219 South Dearborn Street
Chicago, Illinois 60604

Re: 89-C-1822

Dear Honorable Sir:

Attached to this letter is a copy of the *Sum Certain*, denied by defendant. This is the second permission from P.H.S. which allows the plaintiff Willaim [sic] McNiel [sic] to file a tort claim against the defendant Public Health Services.

Plaintiff was exposed and infected with hepatitis B and, also, exposed to AIDS with a possible infection as a result of plaintiff being forced to participate in a study funded by the United States Public Health Services and for the Center for Disease Control.

Also the filing fee for this case was paid for by plaintiff, $120.00 (Check number, #79516; and court clerk's receipt number, 280045).

However, under the circumstances that exist here at Stateville Correctional Center, it's clearly impossible to file proper motions; therefore, plaintiff prays this Honorable Court accepts this letter as a proper request, whereas plaintiff can properly commence his legal action accordingly.

Respectfully submitted:

/s/ William McNeil
William McNeil
No. A-25209
P.O. Box 112
Joliet, Illinois 60434

DATED: August 7, 1989.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the General Counsel
Washington, D.C. 20201

July 21, 1989

CERTIFIED – RETURN
RECEIPT REQUESTED

William McNeil, A-25209
P.O. Box 112
Joliet, Illinois 60434

Re: Administrative Tort Claim of William McNeil

Dear Mr. McNeil:

Transmitted herewith is the Administrative Determination on your claim presented to the Department of Health and Human Services on July 7, 1989.

Please be advised that this letter with enclosure constitutes the notice of final determination as required by 28 U.S.C. § 2401(b).

Sincerely,

/s/ Timothy M. White
Timothy M. White, Chief
Litigation Branch
Business and Administrative
Law Division

Enclosure

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the General Counsel
Washington, D.C. 20201

July 21, 1989

CERTIFIED – RETURN
RECEIPT REQUESTED

Re: Administrative Tort Claim of William McNeil

Date of incident: September, 1987
Date of claim: July 7, 1989
Amount of claim: $500,000.00

ADMINISTRATIVE DETERMINATION

William McNeil, A-25209, P.O. Box 112, Joliet, Illinois 60434, filed an administrative claim under the Federal Tort Claims Act (28 U.S.C. § 2671. *et seq.*) alleging that he was infected with hepatitis and exposed to AIDS as a result of his participation in a study funded by the Center of Disease Control.

The Federal Tort Claims Act authorizes the settlement of any claim for money damages against the United States for injury caused by the negligent or wrongful act or omission of any employee of the Federal Government while acting within the scope of employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The administrative claim of William McNeil is hereby denied. The record contains no evidence of a negligent of wrongful act of a federal employee.

If claimant is dissatisfied with the determination he is entitled to:

1. request reconsideration based on newly discovered evidence, not previously discoverable, pursuant to Department of Justice Regulations (28 C.F.R. § 14.9) within six (6) months from the date of mailing of this determination, or

2. file suit against the United States in the appropriate federal district court within six (6) months from the date of mailing of this determination (28 U.S.C. § 2401(b)).

In the event claimant requests reconsideration, the agency will have six months from the date the request is received to reconsider. If the reconsidered claim is denied claimant may file suit within six months from the date of mailing the final determination.

/s/ Timothy M. White
Timothy M. White, Chief
Litigation Branch
Business and Administrative
Law Division

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted In Printing)

ANSWER

Defendant, by its attorney, FRED L. FOREMAN, United States Attorney for the Northern District of Illinois respectfully responds to plaintiff's Complaint as follows:

Count I

1. Defendant denies the allegations contained in paragraph 1, except admits that plaintiff is a prisoner in the Stateville Correctional Center, Illinois. Defendant states that plaintiff voluntarily participated in a study on the prevalence of HTLV-III LAV and HBV among male inmates, but the study created no risk of disease transmission inasmuch as a separate, sterile needle was used to extract blood from individual inmates.

2. Defendant admits that plaintiff is a resident prisoner of the State of Illinois, and denies the remainder of the allegations contained in paragraph 2 of the Complaint.

3. This paragraph contains plaintiff's statement of jurisdiction to which no response is necessary; to the extent a response is deemed necessary, defendant denies.

4. Defendant denies the allegations contained in paragraph 4 and states that the United States Public Health Service, Center of Disease Control, funded a study

on the prevalence of HTLV-III LAV and HBV among male inmates which was conducted by the Illinois Department of Corrections.

5. Defendant denies the allegations contained in paragraph 5 of the Complaint.

Count 2

1. In response to the first sentence in this paragraph, defendant repeats and reavers its response to paragraphs 1, 2, 3, and 4 of Count One. Defendant denies the remainder of the paragraph.

Count 3

1. In response to the first sentence of this unnumbered paragraph defendant repeats and reavers its response to paragraphs 1, 2, 3, and 4 of the Count One. Defendant denies the remainder of the paragraph.

Defenses

1. The court lacks subject matter jurisdiction over this claim.

2. The complaint fails to state a claim upon which relief may be granted.

3. Plaintiff's requested damages exceed the damages requested in his administrative claim.

4. The injuries and/or damages alleged in the Complaint were not proximately caused by a negligent or

wrongful act or omission of an employee of the United States.

Plaintiff's prayer for relief requires no response; to the extent a response is deemed necessary, defendant denies. Defendant also states that plaintiff is not entitled to a trial by jury under the Federal Tort Claim Act.

WHEREFORE, having fully answered, defendant prays that this action be dismissed and the Court grant such other and further relief as may be appropriate.

Respectfully submitted,

FRED L. FOREMAN
UNITED STATES ATTORNEY

By: /s/ Eileen M. Marutsky
EILEEN M. MARUTSKY
Assistant U.S. Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-1998

(Logo)
DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of the Secretary

Office of the General Counsel
Food and Drug Division
Rockville, MD 20857

January 24, 1989

William McNeil
REG. A25209
P. O. Box 112
Joliet, Illinois 60434

Re: F88-35196

Dear Mr. McNeil:

I am sending your January 17 letter requesting damages to Arthur Simon, the PHS claims officer. It will be treated as an administrative claim. If it is denied, you will have to file a lawsuit.

Sincerely yours,

/s/ Thomas Scarlett
Thomas Scarlett
Chief Counsel

cc: Arthur Simon (w/enclosure)
HFI-35 (Deighton, see FOIA letter)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM McNEIL, Plaintiff,	)	
v.	)	No. 89 C 1822
UNITED STATES PUBLIC HEALTH SERVICE, Defendant.	)	JUDGE JAMES H. ALESIA

MEMORANDUM OPINION AND ORDER

William McNeil brings this action seeking damages against the United States Public Health Service ("the government") under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671, et seq. ("the FTCA"). The pro se complaint charges the government with conducting experiments on prisoners at the Stateville Correctional Center without first obtaining permission from the prisoners. The experiments allegedly were designed to study the spread of infectious diseases among inmates. McNeil asserts he was exposed to AIDS as a result of the experiments and the government's negligence. He requests twenty million dollars in damages. The government has moved to dismiss the complaint for lack of subject matter jurisdiction. For the reasons that follow, the court grants the motion.

The government's motion is based on two limitations periods contained in the FTCA. The first statute, 28 U.S.C. § 2401(b), governs the time for commencing an FTCA suit. It provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

The second statute, 28 U.S.C. § 2675(a), imposes a requirement that the claimant exhaust his administrative remedies before commencing suit under the FTCA. It states, in pertinent part:

> An action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within the six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. . . .

The effect of these statutes is to require a claimant to file an administrative claim before commencing suit under the FTCA. The administrative claim must be filed within two years of the time the claim accrued. If the claim is denied, the claimant has six additional months to file his FTCA suit. If the agency does not act on the claim within six months, the claimant has the option of commencing suit without a final disposition of his administrative claim.

McNeil presented his FTCA case to the court on March 6, 1989. A motion for leave to file in forma pauperis accompanied the complaint. The court ordered ruling on the in forma pauperis motion held in abeyance on June 12, 1989. Only July 7, 1989, McNeil filed his administrative claim with the Department of Health and Human Services. The administrative claim was denied in a letter dated July 21, 1989. The letter notified McNeil that he had six months to file an FTCA suit. Meanwhile, the complaint McNeil had sent to the court in March got lost in the crush of prisoner litigation filed in this district. On April 15, 1990, McNeil paid the filing fee and his complaint was formally filed.

Citing the date McNeil paid the filing fee, the government's motion to dismiss argues that the court lacks jurisdiction over McNeil's claim because he filed the suit more than six months after the denial of his administrative claim. In his responsive brief, McNeil contests the date the government relies on for the filing date of this case. He urges that he commenced suit on March 6, 1989, the day the Clerk assigned it a docket number. The government, in reply, notes that this alternative date does not cure the jurisdictional defect. McNeil did not file his administrative claim until July 1989. The government maintains that if the court accepts McNeil's argument that the March 1989 date is the proper date of filing, it still must dismiss the action, not because McNeil filed his FTCA suit tardily, but rather because he commenced it prematurely.

The first issue the court must decide then is the date of filing for purposes of determining the limitations period. The answer to this question is found in *Smith-Bey*

v. Hospital Administrator, 841 F.2d 751 (7th Cir. 1988). The court there noted "the generally accepted rule that a complaint is deemed 'filed' within the meaning of Fed.R.Civ.P. 3 for purposes of invoking the court's jurisdiction over an action when it is placed in the custody of the district court clerk." *Id.* at 757 n.5. Thus, the operative date of filing in this case is not the day McNeil paid the filing fee, but rather the day he lodged his complaint with the court and filed his motion asking for leave to file without prepayment of the filing fee. In short, McNeil commenced his suit on March 6, 1989.

The federal court has no jurisdiction to entertain a FTCA suit commenced before satisfaction of the administrative exhaustion requirement under § 2675(a). *Charlton v. United States,* 743 F.2d 557, 558-59 (7th Cir. 1984); *Erxleben v. United States,* 668 F.2d 268, 270-71 (7th Cir. 1981). In light of the statutory restrictions Congress has placed on judicial authority to hear FTCA claims against the United States, courts consistently have dismissed for lack of jurisdiction suits brought either without prior attempt to file an administrative claim, *e.g., Best Bearings Co. v. United States,* 463 F.2d 1177 (7th Cir. 1972), or after expiration of the six-month period an agency is allotted to make a final determination on an administrative damage claim. *E.g., Charlton, supra.* Between these two extremes, however, lies a third category of cases, a category into which McNeil's case falls. Although McNeil's case was premature at the time of filing, he had exhausted his administrative remedies by the time the government filed its motion to dismiss. The courts have split on their treatment of cases where plaintiff has exhausted his administrative remedies during the pendency of the FTCA suit.

In *Celestine v. Veterans Administration Hospital*, 746 F.2d 1360 (8th Cir. 1984), the Eighth Circuit permitted an FTCA suit to proceed even though plaintiff had not filed his administrative claim prior to commencing his complaint in federal court. The government moved to dismiss the complaint for lack of jurisdiction soon after it was filed. The district court, however, did not rule on the motion until eighteen months later. In the meantime, unbeknownst to the court, the plaintiff had filed for and been denied relief by the appropriate administrative agency. The Eighth Circuit reversed dismissal of the action, holding that the requirements of § 2675(a) were met if the plaintiff had exhausted his administrative remedies before "any substantial progress had been made on the case." *Id.* at 1363. Citing *Kubrick v. United States*, 581 F.2d 1092 (3d Cir. 1978), *rev'd on other grounds*, 444 U.S. 111 (1979), the court reasoned that it would be a waste of effort to dismiss the case and require refiling when it was clear that the plaintiff had exhausted his remedies at the time of the district court's decision. *Id.* Contrary to the position of the Eighth and Third Circuits, the Fifth Circuit has refused to construe § 2675(a) to allow courts to accept jurisdiction over suits filed before expiration of the six-month waiting period. In *Reynolds v. United States*, 748 F.2d 291 (5th Cir. 1984), plaintiff had filed her FTCA complaint four months after she had filed her administrative claim. Although the administrative agency had denied the plaintiff's claim by the time the district court dismissed her suit, the Fifth Circuit held that this was not enough to save the action from dismissal for lack of jurisdiction. "[S]uits against the government under the

FTCA must be filed in strict compliance with its provisions." *Id.* at 292. The FTCA mandates exhaustion of administrative remedies as a jurisdictional predicate to the filing of suit under the FTCA. Thus, for jurisdiction to exist, it must exist at the time of filing. Because plaintiff had not received a final determination of her administrative claim at the time she filed her suit, *Reynolds* concluded that the district court lacked subject matter jurisdiction at the outset, a defect that could not be cured by a subsequent exhaustion of administrative remedies. *Id.*

The equities may weigh in favor of McNeil, but the court finds itself persuaded by the reasoning of the Fifth Circuit. Moreover, although it has not spoken directly to the issue, the Seventh Circuit generally has opted for strict construction of jurisdictional requirements of the FTCA. As it explained in *Charlton*, 743 F.2d at 558, "[t]he Federal Tort Claims Act is a congressional waiver of sovereign immunity, and a plaintiff's failure to comply with the requirements of the Act leave the plaintiff with no forum for his or her claim." Statutory conditions limiting the terms of the government's consent to be sued as sovereign must be strictly construed. *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979). The conditions cannot be waived. *Erxleben*, 668 F.2d at 271. Nor are they subject to the same equitable considerations that might apply in litigation between private parties. *Houston v. United States Postal Service*, 823 F.2d 896, 902 (5th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). McNeil did not comply with the condition that he exhaust his administrative remedies prior to bringing this action. While dismissal at this time effectively will leave him without any means to pursue

his claim against the government further, this court cannot overlook the effect of his premature filing.

In *Cooper v. United States*, 442 F.2d 908 (7th Cir. 1971), a plaintiff filed an FTCA suit four months after he had filed an administrative claim for damages with the Attorney General of the United States. Although the court affirmed dismissal on grounds that plaintiff had commenced the suit more than two years after his claim accrued, it also indicated that the court could properly have dismissed the suit for failure to exhaust administrative remedies since plaintiff had jumped the gun in filing his suit before the mandatory six-month period had elapsed. *Id.* at 911. The court remarked that limitations periods conditioning a waiver of sovereign immunity should be liberally construed in favor of repose. *Id.* at 191. If under *Cooper* it is proper to dismiss a FTCA action brought only four months after the filing of an administrative claim, it follows that a FTCA complaint filed in federal court before the administrative claims is even filed must also be dismissed.

Accordingly, finding that it lacks subject matter jurisdiction, the court grants the government's motion and directs the clerk to enter judgment dismissing this case in its entirety.

/s/ James H. Alesia
JAMES H. ALESIA
United States District Judge

Dated: JAN 24 1991

United States District Court
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

William McNeil

v.

United States Public Health Service

CASE NUMBER: 89 C 1822

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury as rendered its verdict.

X Decision by Court. This action came to ~~trial or~~ hearing before the court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court finds that it lacks subject matter jurisdiction over this action. The defendant United States Public Health Service's motion to dismiss is granted, and the clerk is directed to enter judgment dismissing this case in its entirety.

January 24, 1991
Date

H. STUART CUNNINGHAM
Clerk

United States Court of Appeals,
Seventh Circuit.

William McNEIL, Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 91-1303.

Argued April 27, 1992.

Decided May 20, 1992.

As Amended May 26, 1992.

Rehearing and Rehearing En Banc
Denied June 26, 1992.

Before CUMMINGS, EASTERBROOK, and RIPPLE, Circuit Judges.

EASTERBROOK, Circuit Judge.

William McNeil is a prisoner of Illinois. In March 1989 he filed this action under the Federal Tort Claims Act, contending that the prison had compelled him to participate in experiments conducted or financed by the United States Public Health Service. One of these experiments, McNeil alleged, was to share a cell with another prisoner who has AIDS. He demanded $20 million in damages.

Among the suit's problems was McNeil's failure to pursue administrative remedies as the FTCA requires. 28 U.S.C. § 2675(a). McNeil filed a claim in June, seeking $500,000 on the assertion that he had contracted hepatitis and been exposed to AIDS. The Department of Health and Human Services denied this claim on July 21, 1989.

Instead of commencing a new suit, McNeil sought assistance in the existing one, attaching the administrative decision to a request filed in August 1989 for the appointment of counsel. The district judge eventually dismissed the action on the ground that it had been filed too soon. It is too late to file another.

According to 28 U.S.C. § 2401(b), a tort claim against the United States must be "begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented." The administrative denial was mailed on July 21, 1989, so McNeil had between then and January 21, 1990, to begin his action. The complaint filed in March 1989 was too early. This left two options. Perhaps the document filed in March 1989 loitered on the docket, springing into force when the agency acted. Or perhaps the request for counsel in August 1989, during the six-month period, marks the real "beginning" of the action. The district court rejected both options, and McNeil, with the assistance of counsel appointed by this court, renews the arguments here.

Two courts of appeals have held that when "the administrative claim is denied before any substantial progress has been made in the pending litigation, the suit need not be refiled to be effective. . . . To hold that refiling was necessary would involve duplicitous pleadings and wasted effort." *Kubrick v. United States*, 581 F.2d 1092, 1098 (3d Cir.1978), reversed on other grounds, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). Accord, *Celestine v. Veterans Administration*, 746 F.2d 1360, 1363 (8th Cir.1984). One circuit has gone the other way. *Gregory v. Mitchell*, 634 F.2d 199, 204 (5th Cir.1981); *Reynolds v.*

United States, 748 F.2d 291 (5th Cir.1984); *United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1306-07 (5th Cir.1987). Make that two: we join the fifth circuit.

Neither the third nor the eighth circuit discussed the language of § 2675(a): "An action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing" or six months have passed without decision. This statute does not authorize suits or postpone adjudication of suits; it forbids the institution of suits prior to the administrative decision. Judges of two circuits believe that Congress erred in writing a prohibition, but that does not explain why the statute Congress actually enacted may be disregarded.

Many statutes have a structure similar to § 2675(a), most prominently the environmental laws. *Hallstrom v. Tillamook County*, 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989), considers a typical provision, in the Resource Conservation and Recovery Act of 1976: "No action may be commenced . . . prior to 60 days after the plaintiff has given notice of the violation" to various persons. 42 U.S.C. § 6972(b)(1). Some courts read this language just as the third and eighth circuits treat § 2675(a): The plaintiff may file the suit any time, but the litigation must remain inactive on the docket during the 60 days reserved for negotiation. The Supreme Court disagreed, holding that "[n]o action may be commenced" means that "[n]o action may be *commenced*" not that "[n]o action may be *prosecuted*". Section 2675(a) is no less insistent that "[a]n action shall not be *instituted*" before the administrative

action (or six months of administrative inaction). *Hallstrom* observes that negotiation may be more effective if there is not already a lawsuit on file, that observation is no less true of the FTCA than of the RCRA. And § 2675(a), as a condition on access to the Treasury, is a prime candidate for literal interpretation, see *Kubrick*, 444 U.S. at 117-18, 100 S.Ct. at 356-57, more so than fetters on litigation against persons despoiling the environment. *Hallstrom* ordains the interpretation of § 2675(a).

March 1959 was too early. The suit did not linger, awaiting administrative action. Unless McNeil began a fresh suit within six months after July 21, 1989, he loses. The only candidate is the collection of materials filed in August 1989: a letter protesting conditions in the prison and implicitly requesting counsel, an "Affidavit in Support of Motion for Appointment of Counsel" (although there was no motion), a statement of the balance in McNeil's prison trust account ($2,117.61), and a copy of the administrative decision plus a cover letter from the agency. McNeil's lawyer contends that the complaint of March was not begun until these documents "perfected" the filing. Yet Fed.R.Civ.P. 3 says that "[a] civil action is commenced by filing a complaint with the court." A complaint, not a request for a lawyer, begins the action. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984). McNeil's contention that the set of documents "perfected" the action repackages his submission that the suit lingered, awaiting activation by the administrative action. This variation meets the fate of the theme.

Only if the letter was itself a complaint does the submission satisfy the statute. *Baldwin County Welcome*

Center holds that the combination of a request for counsel plus an administrative decision (there, a letter from the EEOC giving the person the right to file suit under Title VII of the Civil Rights Act of 1964) does not satisfy Fed.R.Civ.P. 8 and hence is not a complaint. By contrast, a letter narrating the facts and making a claim for relief may be a complaint. *Pearson v. Gatto*, 933 F.2d 521, 526-27 (7th Cir.1991). Where does McNeil's letter fall on this spectrum? We need not decide, for McNeil did not characterize the letter as a complaint in the district court (where he represented himself) or here (where a professor of the Loyola School of Law is serving as his counsel). Whatever scope the doctrine may have in civil litigation, see *Deppe v. Tripp*, 863 F.2d 1356 (7th Cir.1988), it was not plain error in light of *Baldwin County Welcome Center* to treat this document as what it purported to be – a request to get on with a pending case, rather than a new complaint. *Baldwin County Welcome Center* holds that a person who receives a notice from an agency telling him exactly what to do (file a complaint) has no equitable claim to lenient treatment when he chooses to do something else. Just so here.

AFFIRMED.

RIPPLE, Circuit Judge, dissenting.

In my view, we need not resolve in this appeal the difficult issue of whether a Federal Tort Claims Act suit must be refiled when the administrative claim is denied before any substantial progress has been made in the pending litigation. That issue has divided the courts of appeals and certainly deserves resolution by the Supreme Court of the United States. The Court took note of the

issue in 1979 but explicitly declined to resolve it. *See United States v. Kubrick*, 444 U.S. 111, 115 n. 4, 100 S.Ct. 352, 356 n. 4, 62 L.Ed.2d 259 (1979).

Here, it is clear that the plaintiff, a prisoner proceeding pro se, attempted to refile the action after the denial of the administrative claim. On August 7, 1989, he wrote to the district court. His letter sets forth the gravemen of his complaint against the Public Health Service, asks the court to accept "this letter as a proper request, whereas plaintiff can properly *commence* his legal action accordingly." (Emphasis supplied). Under the circuit's holding in *Pearson v. Gatto*, 933 F.2d 521, 526-27 (7th Cir.1991), this letter serves as an adequate complaint.[1]

ORDER

Plaintiff-Appellant filed a petition for rehearing and suggestion of rehearing en banc on May 28, 1992. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED. Judge Flaum did not participate in the consideration or decision of this case.

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[1] I respectfully differ with my colleagues as to whether Mr. McNeil raised this issue adequately in this court. *See* Appellant's Br. at 7. The government shares my view. *See* Supplemental Government Br. at 4. Nor, given the standards of pleading to which we hold incarcerated pro se litigants, do I believe that the characterization of the document as a complaint was "waived" in the district court. Mr. McNeil made one point clear to the district court in August 1989: despite the difficulties of filing papers with the court from Stateville Correctional Center, he was attempting to "commence his legal action."

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: May 20, 1992

BEFORE: **Honorable** Walter J. Cummings, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge

No. 91-1303

WILLIAM MCNEIL,
Plaintiff – Appellant

v.

UNITED STATES OF AMERICA
Defendant – Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 89 C 1822, Judge James H. Alesia

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is **AFFIRMED,** with costs, in accordance with the decision of this court entered this date.

Supreme Court of the United States

No. 92-6033

William McNeil,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of the petitioner must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., March 1, 1993. The brief of the respondent must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., March 31, 1993. A reply brief, if any, must be received by the Clerk and served upon opposing counsel on or before 3:00 p.m., April 12, 1993. Rule 29 does not apply. The case is set for oral argument during the Session beginning April 19, 1993.

January 15, 1993

FILED
MAR 1 1993
OFFICE OF THE CLERK

No. 92-6033

In The

Supreme Court of the United States

October Term, 1992

WILLIAM MCNEIL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Whether an incomplete filing of a Federal Tort Claims Act suit may be perfected by filing a notice of final agency denial of the claim prior to substantial progress on the merits?

II. May the United States government bar a Federal Tort Claims Act suit when a *pro se* prisoner files a premature suit, but satisfies the Congressional requirement – that the claim be presented to and denied by the agency before it is heard by the court – by filing a final agency denial of the claim prior to any substantial progress on the merits of the case, and, in so doing, requests the court to "commence his legal action?"

PARTIES

The caption contains the names of all the parties below although the United States was referred to as United States Public Health Service in the District Court.

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Fritz v. Regents of the University of Colorado, 196 Colo. 335, 586 P. 2d 23 (Colo. 1978) 34

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OPINIONS BELOW

The unreported opinion and judgment of the United States District Court of the Northern District of Illinois, *William McNeil v. United States Public Health Service*, No. 89 C 1822 dismissing the case on January 24, 1991 is reproduced in the Joint Appendix at 18 and 25.

The opinion of the United States Court of Appeals for the Seventh Circuit in *William McNeil v. United States* (Judge Ripple dissenting) is reported at 964 F.2d 647 (7th Cir. 1992) and along with the Judgment is reproduced in the Joint Appendix at 26 and 32 along with the decision of the United States Court of Appeals for the Seventh Circuit of June 26, 1992 denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc.

The order of the Supreme Court granting certiorari and leave to proceed in forma pauperis is reprinted in the Joint Appendix at 33.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of the case was filed on May 20, 1992, and amended May 26, 1992. (with Judge Ripple dissenting) and appears at Joint Appendix 26.

Petitioner's subsequent Motion for Rehearing and Suggestion for Rehearing en Banc was denied by the United States Court of Appeals for the Seventh Circuit on June 26, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

A petition for certiorari was duly filed in this court on September 21, 1992, and granted on January 15, 1993, which order is contained in the Joint Appendix at 33.

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. section 2675(a) now reads in pertinent part:

"An action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency. . . . The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant at any time thereafter, be deemed a final denial of the claim for purposes of this section."

The Appendix to this brief includes the following Statutes at Large, Public Laws and U.S.C.A. sections:

60 Stat. 843 (August 2, 1946) (79th Cong. 2nd Sess.)
Section 410(b), 60 Stat. 844 (Aug 2, 1946) (79th Cong. 2nd Sess.)
Section 420, 60 Stat. 845 (August 2, 1946) (79th Cong. 2nd Sess.)
62 Stat. 971 (June 25, 1948) (80th Cong. 2nd Sess.)
62 Stat. 983 (June 25, 1948) (80th Cong. 2nd Sess.)
63 Stat. 62 (April 25, 1949) 81st Cong., 1st Sess.)
63 Stat. 107 (May 24, 1949) (81st Cong. 1st Sess.)
Pub L. 86-238, 73 Stat. 472 (Sept 8, 1959)
Pub. L. 89-506, 80 Stat. 306 (July 18, 1966)
Pub. L. 89-506, 80 Stat. 307 (July 18, 1966)
28 U.S.C. Section 2675 (1992 pocket part, U.S.C.A.)
28 U.S.C. Section 2675 (U.S.C.A. 1965)
42 U.S.C. Section 6972(b)

STATEMENT OF THE CASE

Prior to filing suit Mr. McNeil demanded damages by a letter dated January 17, 1989 he mailed to the Department of Health and Human Services, Public Health Service. On January 24, 1989 the Chief Counsel for the

Department informed Mr. McNeil that his letter would be forwarded to a Public Health Services claims officer. Jt.App.17. By letter dated February 9, 1989, Mr. McNeil was informed that no records could be located of the alleged experiments. Jt.App.8.

On March 6, 1989 Mr. McNeil filed suit pro se in the United States District Court for the Northern District of Illinois. Jt.App.1. In that suit Mr. McNeil alleged that agents of the federal government conducted AIDS and Hepatitis B experiments upon Mr. McNeil without his consent while he was a prisoner in Stateville Correctional Center, Jt.App.3-7, and that he contracted hepatitis as a result of these experiments. Jt.App.7, 10. The experiments alleged also included being forced to "except (sic) cell-mate with A.I.D.S." Jt.App.7, which "clearly impared (sic) Plaintiff life" Jt.App.7.[1]

Mr. McNeil's March 6, 1989 filing was lost by the court at some point in the "crush of prisoner litigation." Jt.App.20. Mr. McNeil's initial request for permission for leave to proceed in forma pauperis was stayed by an order of the court on June 12, 1989 pending further order of court. Jt.App.1.

On July 7, 1989 Mr. McNeil filed another claim in the Department of Health and Human Services. Health and Human Services denied this claim (for $500,000) on July 21, 1989. Jt.App.11-13.

On August 7, 1989 Mr.McNeil sent a letter to the district court Jt.App.10, and an affidavit in support of his

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[1] The three page complaint alleged three interrelated counts. These experiments were alleged to be on the spread of infectious diseases, and included forcing AIDS carriers to cell with other inmates. The experiments were allegedly in violation of HEW and FDA regulations. The allegations included negligent failure to warn, "adequate to warn the Plaintiff concerning the long term effects of exposure to the infectious diseases," as well as fraud and deceit. The complaint requested "the sum of 20,000,000,000 twenty million dollars" [sic] Jt.App.7.

earlier motion for appointment of counsel. Record, Item 5 Mr. McNeil attached a copy of the Sum Certain Denial of July 21, 1989 with that filing. Jt.App.12-13. At the time this letter was filed the government had neither answered nor moved to dismiss. The August 7, 1989 letter included the statement:

"However, under the circumstances that exist here at Stateville Correctional Center, it's clearly impossible to file proper motions; therefore, plaintiff prays this Honorable Court accepts this letter as a proper request, whereas plaintiff can properly *commence* his legal action accordingly." (emphasis added)

The letter also contained a statement that the copy of the Sum Certain attached was the "second permission from P.H.S. which allows plaintiff Willaim (sic) McNeil to file a tort claims against the defendant Public Health Services." Jt.App.10.[2]

On April 20, 1990 the district court found that Mr. McNeil had paid the filing fee, and that therefore the motion for leave to proceed in forma pauperis was moot. Jt.App.1. On April 20, 1990 the district court ordered service by the United States Marshall's office because Mr. McNeil was incarcerated. Jt.App.1.

A docket entry indicates that Mr. McNeil's [original] complaint was filed on May 15, 1990. Jt.App.2.[3]

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[2] The record is not clear what Mr. McNeil considered the first permission, although the February 9, 1989 letter indicating that no records could be located of the alleged experiments is one possibility. On August 19, 1989, an affidavit in support of a motion for appointment of counsel with attachments including the August 7, 1989 letter was received by the clerk and docketed on August 25, 1989. Jt.App.1.

[3] A photocopy of a check dated May 9, 1989, made out to Clerk H. Stuart Cunningham [who is clerk of the United States District Court for the Northern District of Illinois] for $120, drawn on the Stateville Correctional Center, Inmates' Trust Fund, and stamped paid May 18, 1989 with an entry on the face 89C1822 was attached to Mr. McNeil's April 9, 1991 brief in the Seventh Circuit. However, the first docket entry reflecting payment was on April 25, 1990 and reflected that the receipt was temporarily unavailable. Jt.App.1. The docket entry on April 25, 1990 indicated it was filed May 15, 1990. Jt.App.1. No subsequent docket entry reflects either the date the payment was received or that the receipt had been located [or whether the May 15, 1990 date should have been May 15, 1989 instead]. Service of process upon the U.S. Public Health Service was reflected by a docket entry of August 7, 1990. Jt.App.2.

On August 28, 1990, the United States Government answered Mr. McNeil's complaint alleging that Mr. McNeil had voluntarily agreed to the experiments; that the experiment had employed separate sterile needles to extract blood from each inmate; that the United States Public Health Service, Center for Disease Control admitted it had funded a study on the prevalence of HTLV-III LAV and HBV among male inmates; and that the government generally denied liability. Jt.App.14-16.

On September 19, 1990 the Government moved to dismiss alleging that the suit was barred under 28 U.S.C. Section 2401(b). Record, Item 19. On January 24, 1991, the District Court granted the government's motion to dismiss. The court held that the suit had been filed on March 6, 1989, and Mr. McNeil had not complied strictly with the Federal Tort Claims Act in that the sum certain denial had not been received prior to filing suit. Jt.App.18.

This finding was affirmed by a 2-1 decision of the United States Court of Appeals for the Seventh Circuit in its judgment and opinion of May 20, 1992 even though the opinion stated, "[i]it is too late" for Mr. McNeil "to file another [suit]." Jt.App.27. The opinion of the Seventh Circuit rested in part upon this court's holding about an analogous filing requirement for environmental laws in *Hallstrom v. Tillamook County*. 493 U.S. 20 (1989).

Jt.App.28. The dissent by Judge Ripple, found it unnecessary to reach the "difficult issue of whether a Federal Tort Claims Act suit must be refiled when the administrative claim is denied before any substantial progress has been made in the pending litigation. . . . [because] it is clear that the plaintiff, a prisoner proceeding pro se, attempted to refile the action after the denial of the administrative claim [by sending the August 7, letter]." Jt.App.30-31.

A Petition for Rehearing with Suggestion for Rehearing En Banc was filed on May 28, 1992. Jt.App.26. The Petition for Rehearing suggested inter alia that neither the government nor counsel for Petitioner were aware of *Hallstrom v. Tillamook County*, and thus that neither had given the Seventh Circuit the benefit of their analysis. Pet. for Rehearing, p.2. The Petition suggested that the legislative history of the Federal Tort Claims Act was considerably different from that of the environmental statutes involved in *Hallstrom v. Tillamook County* and that this court's decision in *Hallstrom v. Tillamook County* did not bar petitioners from any access to judicial relief. Pet. for Rehearing, p.3. The Petition for Rehearing was denied June 26, 1992. Jt.App.26.

A petition for writ of certiorari was filed in this court on September 21, 1992. Certiorari was granted on January 15, 1993 along with an order granting in forma pauperis status. Jt.App.33.

SUMMARY OF ARGUMENT

The question presented to the Court is whether the government may exalt form over substance by requiring prematurely filed Federal Tort Claims Act cases with procedural defects to be dismissed even when the defect is cured before the district court acts to assert jurisdiction over the substance of the claims. If the government's position is correct it will result in one of two unproductive outcomes: prematurely filed cases with cured defects will be dismissed and refiled, thus simply adding a level of paper shuffling to the case; or prematurely filed cases

with cured defects will be dismissed and time barred because the statute of limitations would have run, as it has in this case. Such plaintiffs will be denied their day in court, even though they have complied with the notice and exhaustion requirements of the Federal Tort Claims Act.

Mr. McNeil fully complied with the Congressional requirement that he make an administrative demand upon the relevant federal agency. Indeed, Mr. McNeil, a pro se plaintiff, complied with each and every expressed Congressional purpose by August of 1989 by presenting two Sum Certain Demands on the relevant administrative agency. Moreover, he twice fulfilled the exhaustion requirement, once through receiving a sum certain denial about which he informed the court, and the second time through passage of time. Even were his initial court filing ineffective, by the time of his August 1989 filings when Mr. McNeil specifically requested that he be permitted to "commence his legal action" his suit should proceed either because that filing constituted a new filing, or alternatively, a filing that perfected his original court filing. The loss of Mr. McNeil's court record should not be permitted to injure him.

The legislative history of the Federal Tort Claims Act establishes clear intent to waive sovereign immunity for certain torts including the one at issue in Mr. McNeil's case. In doing so, Congress intended that courtroom doors be opened, while the doors to Congress were simultaneously shut to private bills that clogged Congress and burdened the President. No claims were to be cut off; justice and fairness were the objectives of the new remedy system. Claimants against the government were to be treated the SAME as litigants suing private defendants. The Federal Tort Claims Act was to be a simple remedy. The only limitation on the timing of suit in the original passage of the Federal Tort Claims Act was that claims under $1,000 had to first be presented to an administrative agency, but the claimant was free to withdraw such claims upon 15 days notice in writing and file suit.

Subsequent legislative considerations of amendments to the Federal Tort Claims Act, including the 1966 amendments (which expanded the requirement of presentation of claims to administrative agencies regardless of the amounts at controversy) lack any expressed intention to condition the right to sue on strict technical compliance in presenting claims to an administrative agency. Moreover, no subsequent amendment incorporates any articulated "condition upon waiver of sovereign immunity" for the waiver of such immunity had already been given in 1946.

Exhaustion is quite a different matter. Petitioner McNeil does not dispute that the exhaustion requirement in the FTCA is a prerequisite to recovery under the Act. The question here, however, is how should the government treat claims by plaintiffs who file prematurely but cure any defect before the court moves to dismiss their case. If the district court had turned to Mr. McNeil's claim before he had exhausted as required by the FTCA, the government could have had a basis on which to object, and the court could have dismissed the claim. Mr. McNeil could then simply exhaust and refile. In fact, Mr. McNeil had exhausted nearly a year and a half *prior* to dismissal of his case.

The legislative history of the 1966 amendments indicates that Congress found guidance for the requirement that all claims be presented administratively in statutes relating to suits against municipalities. This court may similarly seek such guidance. The weight of judicial treatment of such municipal statutes suggest that substantial compliance with the presentation of such claims to the municipalities suffices. (Indeed, authority exists that filing suit during the time for giving such notice, constitutes adequate notice.) Moreover, there is ample authority that such statutory notice requirements are statutes in derogation of the common law which should be construed strictly against the municipality and in favor of the claimant's right to litigate.

Nowhere in the legislative history of the Federal Tort Claims Act or its amendments, including amendments during and subsequent to 1966, has a single member of Congress or a committee of Congress expressed any intention, or contemplation that the Federal Tort Claims Act should be strictly construed with respect to its notice provisions. Indeed, the pro se litigant, appears never to have been mentioned, although Congress did manifest its intention to encourage the presentation of FTCA claims.

A rule that claims filed prematurely may be perfected so long as no substantial progress has occurred is consistent with the intent of Congress to promote remedies under the Federal Tort Claims Act so that claimants receive their day in court. No reason in policy exists explaining why a remedy for a tort by a Governmental employee should be fundamentally different from that against a private tortfeasor, so long as all expressed purposes of Congress have been satisfied. It is the presentation and exhaustion of the administrative claim that fulfills those purposes. Mr. McNeil did both.

The government's position is particularly harsh in the case at bar when Mr. McNeil filed his sum certain denial along with an affidavit explaining his lack of books in jail and his desire that the court "commence" his claim. The dissent below found that this plea for the court to commence proceedings constituted a complaint, i.e., a supplemental pleading, which clearly cured the prior defect, if any. *See*, Federal Rules of Civil Procedure 15(d) (court may permit the party to serve a supplemental pleading setting forth new events which have happened since the date of pleading sought to be supplemented even though the original pleading is defective in its statement of a claim for relief.)

Mr. McNeil alleges that he contracted hepatitis as a result of government-conducted and sponsored experiments to which he was subjected without his consent. He did everything in his power to pursue his rights against the government under the Federal Tort Claims Act. He

should not be penalized by a cramped construction of a requirement ultimately met before the government's position on the merits was ever pleaded, much less prejudiced.

The statutes considered in *Hallstrom v. Tillamook County,* 493 U.S.20 (1989) are distinguishable, both because of the different legislative history, as well as because the explicit Congressional purpose of encouraging governmental entities to sue about "public environmental rights" cannot be satisfied by premature "private attorneys general" litigation. The Federal Tort Claims Act involves essentially private rights for which the provision of remedies was Congress's clear and primary aim.

In Mr. McNeil's case, since the administrative remedy has failed, Congress's intent that the judicial remedy be available, should be honored.

ARGUMENT

1. Federal Torts Claims Act Legislative History

OVERVIEW:

The Federal Tort Claims Act enactment in 1946 waived sovereign immunity for all torts covered. Subsequent statutory changes do not affect the essence of that waiver, for the waiver was unconditional. The 1966 amendments were not conditions on a waiver, for the waiver took place 20 years prior. The 1966 amendments were attempts to improve procedures with respect to claims against the Government. The objectives of fairness and equality of treatment between private claimants suing the government and such private claimants suing other private parties were fundamental objectives of Congress beginning with the 1946 enactment and remained so. Not once during consideration of the Federal Tort Claims Act or subsequent amendments in 1940, 1942, 1946, 1948, 1949, 1959, 1966 or thereafter, did a single Congressperson indicate a desire (or contemplation) that strict compliance with the procedural *notice* provisions

were jurisdictional prerequisites or conditions on the waiver of immunity itself. Nowhere did Congress endorse a cramped interpretation of the waiver of sovereign immunity, or express any explicit intent that the doctrine that the king could do no wrong survived in peculiar forms of ritual ceremonies. Not one Congressperson discussed a *pro se* claimant, and the few references to attorneys were primarily directed at ensuring that claimants had access to adequate, competent counsel to represent them.

The context of the passage of the Federal Torts Claims Act (App. 1) is important for the Act was only *part* of the Legislative Reorganization Act of 1946 although passage reflected years of legislative consideration of FTCA bills, including requests of waiver of governmental immunity from suit that go back at least to President Lincoln's First Annual Message to Congress, December 3, 1861.[4] The American Bar Association supported a 1940 FTCA draft, a draft described as treating rich and poor alike, which was virtually identical to the Federal Tort Claims Act eventually enacted in 1946.[5]

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[4] "It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the government, especially in view of their increased number by reason of the war. It is as much the duty of government to render prompt justice against itself in favor of citizens as it is to administer the same justice between private individuals. The investigation and the adjudication of claims in their nature belong to the judicial department. Congressional Record, 76th Congress, Third Session, Vol. 86, June 22, 1940, at 4175.

[5] Testimony before the House Judiciary Committee, April 3, 1940, reprinted at Congressional Record, 76th Congress, Third Sess. Vol. 86, June 22, 1940, p. 4175 supporting a 1940 bill that would:

"[R]elieve Congress of the necessity of considering the many private bills . . . with the attendant waste of time and, . . . it will afford the private citizen easy and simple access to the courts of the United States. . . .

However, the Legislative Reorganization Act of 1946 went far beyond enactment of the Federal Torts Claims Act. The Act was a major attempt to reorganize Congress into a more efficient body. The FTCA portion of the Act involved a legislative trade off, a ban of private (tort) bills if Federal Torts Claims Act procedures were applicable.[6]

"The poor injured person should be given the same right to have his day in the United States courts as has been given by Congress to big shipowners to sue in tort, contractors, patentees, and taxpayers. There should be no discrimination in Congress between citizens of this country. The poor and the rich should be treated alike. Members of Congress should not be obliged to spend a great deal of their time in pressing private claims, but in these critical days should be able to give their time to matters of high importance to our great country and the people. It is an imposition to call upon members of Congress to handle private claims.

It is submitted that the ability to proceed against the Government for torts committed by its agents should be a right. In effect, the United States is a corporation, exercising all the privileges and functions of a corporation, and should be answerable to its citizens for its wrongs in no less a degree than a private person or a body corporate.

We believe that the proper forum for relief for personal injuries or injury to property, occasioned by acts of government agents, is in the United States courts where the judge would have the opportunity of seeing and examining all witnesses and weighing the matter of liability, rather than having the relief in any manner dependent upon representation before committees by congressional representatives through friendship or because of political affiliation."]

[6] Part 3 – Section 121, Ch. 773 – Public Law 601, reprinted at U.S. Congressional Service, 79th Congress, Second Session, 1946 at 796. Other major items included in the Legislative Reorganization Act of 1946 were the reorganization of the committee structure of Congress (and associated rule changes) which inter alia drastically reduced the number of committees (from 48 to 19 in the House) (Title I, sec. 121); various provisions regarding congressional personnel (Title II, Part 1); regulation of lobbying

A. The Hydraulic Pressure of Private Torts Claims Bills on Congress and the President Was Perceived as Enormous as Was the Demand for the Same Right to a Day in Court for Claimants against the Government as Claimants had against Private Defendants; Sovereign Immunity was seen as an Incongruous Entity with only Historical Justification

The simple volume of private claims bills representing tort claims for property and personal injury claims had long been perceived as an excessive burden on both Congress and the President.[7]

(Title III); increases in compensation and retirement pay for Congressmen (Title VI); and a general bridge act (Title V), which removed most bridge approvals from Congress. It appears Congress deliberately sought to eliminate less important functions from its responsibility. This was not a random conglomeration of unrelated bills. See, Congressional Record – Senate, 79th Congress, Second Sess. Vol. 92, July 26, 1946, 10140. An earlier version of the act had included provisions providing for a degree of self rule for the District of Columbia, but those provisions were severed in deference to a similar bill from another committee. Congressional Record – Senate, 79th Congress, Second Sess. Vol. 92, June 6, 1946, 6397.

[7] On June 16, 1942 House Report No. 2245, 77th Congress, Second Sess. from the Committee on the Judiciary (to accompany S. 2221) indicated that more than 2,000 private claims bills were introduced in each Congress, with a substantial percentage of these representing claims for property damage or personal injury. (p. 6)

Almost 6,300 private claims bills had been submitted during the three congresses prior to the 77th Congress. President Roosevelt stated in his message of January 14, 1942, reprinted in part at p. 6 of the House Report No. 2245: "And of all the bills which I vetoed during these Congresses, fully one-third was made up of private claim bills."

The costs of such bills (excluding Congressional salaries) was estimated at $125,000, the printing cost alone for bills that

The torts provisions of the bill considered by Congress in 1942 (virtually identical to the Federal Torts Claims Act provisions passed in 1946) were:

> "an effort to achieve the objectives expressed in the President's message of January 14, 1942 (a) to set up a satisfactory procedure for the administrative and judicial determination of negligence claims in order that the Congress and the President should be relieved of the burden and expense of disposing of such matters by private claim bills and (b) to extend to claimants against the Government the *same right to a day in court* which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims. By thus removing a considerable burden from the shoulders of the Claims committees of both Houses, as well as from the members of Congress as a whole, added time will be made available for the consideration of matters of grave national importance." Senate Report No. 1196, (to accompany S. 2221) 77th Congress, 2nd Sess. March 25, 1942, p. 5. (emphasis added)[8]

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fail to pass was almost $19,000 per Congress, and that it costs $200 to pass a single bill, although in some cases the claims bills are enacted in amounts less than $200. (p.6) The President supported the Federal Tort Claims Act as a "means of dispensing justice *simply* and effectively to tort claimants against the Government and give them the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims." p.6. (emphasis added).

[8] The report went on to state: "As a result of the statutes briefly summarized above, the Government is subject to suit in contract, on admiralty and maritime torts, and for patent infringement. On the other hand, no action may be maintained against the Government in respect to any common law tort. *The existing exemption in respect to common law torts appears incongruous. Its only justification seems to be historical.* With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles." House Report No. 2245, 77th Congress, Second Sess. June 16, 1942 p. 7 (emphasis added)

Former Attorney General Robert H. Jackson had supported a similar bill by a letter of Feb. 14, 1940 which stated: "The present law under which the Government may not be sued in tort, and such claims can receive recognition only as a matter of grace by private acts of Congress, appears to be not only cumbersome but unfair to those persons who have meritorious claims. . . . The continued immunity of the Government to suit on common law torts does not seem to be warranted either as a matter of principle or as a matter of justice." H.R. Report. No. 2245, p. 12.

[9] Rep. Monroney went on to state that 435 saints could not possibly do with Congress's present equipment and organization it was so obsolete and antiquated. (Id. at 10041)

B. Legislative History of the 1946 Enactment confirms the Purposes of the Federal Tort Claims Act Include Saving Congressional Time While According Claimants the SAME RIGHT TO A DAY IN COURT as if Private Defendants Were Being Sued

Rep. Monroney who shared floor responsibility for the Legislative Reorganization Act of 1946 described the bill as a whole by reference to a single overarching test:

> "One test and one test alone has been applied to every suggestion that has been incorporated in the bill in the committee's recommendation and that is simply the question 'Will it help the Congress to do a better job?' " Congressional Record – House, Congress, Second Sess. Vol. 92, June 25, 1946. 10039.[9]

Rep. Monroney emphasized that no claim would be blocked by the legislation, there would be a place to go to seek a remedy:

> "[I]n this claims section every time we have closed the door of admittance of a claim on the floor of Congress we have opened up another door in the administrative departments or in the courts of the land so that those claims can be adequately adjudicated. Therefore, there will be no claims blocked. . . . Either they have a right to come up on the floor of the House or to come before the Congress or they can go into the courts." Congressional Record – House, 79th Congress, Vol. 92, July 25, 1946, 10039.

Rep. Dirksen (who shared floor responsibility) stated, "[W]hat better than to endow upon the citizen of the country the right and the authority, notwithstanding the old doctrine under which the king could not be sued by a

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Rep. Monroney pointed to the hands on the clock in the chamber: "[T]he demands on his [a Congressperson's] time are incessant and even oppressive. . . . So comprehensive are the many changes proposed, so significant is each to our policy and procedure, and so worthy is each of special note that it is impossible here to attend to all. A quick review will, however, show us an impressive array, revolutionary yet fitting. Witness. Improved fiscal procedure. Private bill banned; the claims deferred to the courts. . . . " (Id. at 10054) The theme of Saving Congressional Time was much reiterated. See Remarks of Rep. August H. Andresen which included part of committee report 10046-48 "Saving Congressional Time. . . . Congress is overburdened by many local and private matters which divert its attention from national policy making and which it ought not to have to consider. It functions as a common council for the District of Columbia. It serves as a tribunal for the settlement of private claims. . . . " Id. at 10048

The legislation enacted in 1946 was substantially identical to the drafts of the Federal Tort Claims Act considered in 1940 and 1942.

subject, to go into the district courts? We confer upon the district courts of the country the right to hear these suits, and that immunity is waived. *Let the district judge do it. . . . it is his responsibility.*" (Id. at 10049) (emphasis added)

Few representatives opposed the Federal Tort Claims Act provisions of the Legislative Reorganization Act of 1946. Those few included Rep. Scrivner who agreed with its proponents by describing the bill as providing for the right to sue the Government *"just exactly as against the private individual."* Congressional Record – House, 79th Congress, Vol. 92, July 25, 1946, 10092.

The same themes of saving time for Congress, of access either to the administrative agency or the courts were sounded in the Senate. According to Senator LaFollette, the Senate floor leader, the bill's purpose was, "[N]ot to cut off claimants who might have proper claims to present to the Government. It will permit them to press their claims. . . ."[10]

The citizen was entitled to either a judicial, administrative, or Congressional remedy. To deny Mr. McNeil a remedy, leaves him and similarly situated citizens no option but to seek relief through a private bill in Congress, exactly the remedy and *burden* on Congress[11]

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[10] Congressional Record – Senate, 79th Congress, Second Sess., June 5, 1946, 6344. The Act was seen as very important legislation. Sen. LaFollette went on: "So I weigh my words when I say that I think the ultimate fate of democracy is bound up in this first step forward in the reorganization and modernization of our National Legislature." (Id. at 6370-71)

[11] Senator Bridges even suggested various Congressmen died from overwork, partly from the fact that 9000 bills were pending in Congress. Congressional Record – Senate, Congress, First Sess. June 10, 1946, 6559.

Senator Barkley lamented the lack of time during recesses of Congress such as Henry Clay had once enjoyed and spent wearing out a depression in a path while contemplating next

which Congress had sought to eliminate by passage of the Legislative Reorganization Act of 1946.[12] This court

January's speeches he intended to make. Congressional Record – Senate Congress, Second Sess. Vol. 92 June 8, 1946. 6537.

Senator White, who had been a clerk in the Senate 45 years prior noted that, "In those days a great senator, such as Senator Lodge, with influence throughout the world, had time and took time to rewrite a speech eight times before delivering it on the floor of the Senate. We frequently stand here on the floor of the Senate and talk without having had a moment's preparation. . . . The congress of today is performing a volume of work which it was never designed to perform but which it cannot avoid." 6531-32

An example was cited of a claim for $163.20 that took 16 years to pay through a private bill. Congressional Record – Senate, 79th Congress, Second Sess. Vol. 92, June 19, 1946 (legislative day of March 5, 1946) A3604.

[12] Strong support existed across the nation for the Legislative Reorganization Act of 1946. Numerous newspaper editorials supported the bill. See Extensions of Remarks of Sen. Robert Taft, Congressional Record – Senate, Congress, Second Sess. Vol. 92, June 25, 1946, A 3732-33, and Rep. Estes Kefauver (Tenn.) A3733-34, including an editorial from the World Herald of Omaha, Nebraska. "There would be new machinery for handling property-damage and personal-injury claims against the United States and the flood of petty claims bills would be stemmed. . . . It is 'must' legislation if the Congress of the United States is to continue its legislative functions." A3734, A 3723-24, and Rep. Charles A. Plumley (Vt.), Editorial of the New Bedford (Mass) Standard-Times, of June 12, 1946, "Further to promote the aim of giving Members of Congress more time to devote to the major business of law-making is a prohibition of what are called private bills. These usually are concerned with small claims for damages." Congressional Record – Senate, 79th Congress, Second Sess. Vol. 92, June 26, 1946, A3748, and Rep. A.S. Mike Monroney (Cal.) "Three Hundred and Eighty Newspapers Support Reorganization of the Congress." Congressional Record, 79th Congress, Second Sess. Vol. 92, July 12, 1946 A 4247-48, and Sen. Robert A. Taft (Ohio) "Our Horse-

should not reimpose that burden without clear Congressional indication it should be reimposed, or alternatively, some clear policy purpose of Congress that would be served, rather than disserved, by such reimposition.

C. The 1966 Amendments Continue the Same Themes: Justice and Equality of the Private Claimant in Actions Against the Government as in Private Actions.

The requirement that all federal tort claims be submitted for administrative determination was aimed at saving time, money, and providing effective justice for both the private claimant and the government. No indication exists in the legislative history of any intent to create a trap for the unwary *pro se* claimant. Instead Congress sought a new balance, preserving the right to sue while encouraging a limited form of administrative exhaustion, a six months *grace* period for negotiation.

The 1966 amendments to the Federal Torts Claims Act required for the first time that all claimants present a claim to the appropriate administrative agency prior to filing suit.[13] Since 1966 the Federal Torts Claims Act has

and-Buggy Congress" Congressional Record, 79th Congress, Vol. 92, A3732-33.

[13] In 1959 the amount for which administrative submission was required was raised from $1,000 to $2,500. (73 Stat. 472, App. 14) The agency was given 6 months to consider the claim. Final denial in this connection, included instances where partial approval of a claim resulted in an offer unacceptable to the claimant and are rejected by him. Thus the end result would be a denial of the claim. However, if the agency failed to act in 6 months, the claimant may elect to regard this inaction as a final denial and proceed to file suit. The claimant has six months from the date of mailing of a denial to file suit. The 1966 requirement of presentation of all claims to the appropriate administrative agency was accompanied by elimination of the 15 day right to withdraw a claim by notice in writing.

remained for purposes of the instant litigation in substantially the same form that it has today.[14]. During legislative consideration in 1966 of a package of amendments to the Federal Tort Claims Act and related statutes, concepts of *fairness* and *equality* between the Government and private litigants were often mentioned.[15] One of the 1966 bills

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[14] In 1974 certain intentional torts were covered by the Federal Tort Claims Act, see Congressional Record – Senate, 93d Cong., First Sess., Vol. 119, October 10, 1973, 33495, remarks of Sen. Hruska ("primary purpose was to put the Federal Government on a par with private employers in situations where employees committed torts within the scope of their employment," and related remarks of Sen. Percy, Congressional Record – Senate, 95th Cong., Second Sess., Vol. 124, April 10, 1978, 9467. Also see a proposal by Sen. Stevenson to extend FTCA coverage to include ultrahazardous activity, Congressional Record – Senate, 93rd Cong., First Sess., Vol. 119, October 26, 1973, 35085. In each instance the proposal or enactment was aimed at making the same remedies available for intentional torts or ultrahazardous activity against the federal government as would be available against private defendants. As Sen. Stevenson stated: "I see no reason why the Federal Government should remain immune while private persons can be sued for the identical dangerous conduct." Equality continued as a dominant theme, with no hint of special exceptions.

[15] A package of four interrelated bills (S. 3142, S. 3143, S. 3161 & S. 3162) on recommendations from the Department of Justice were introduced. Congressional Record, House, 89th Cong. Second Sess. Vol. 112, June 6, 1966. H.R. 12259. Other objectives were also mentioned, including reduction of the volume of private relief bills, encouraging early trials while memories were still fresh and necessary witnesses and documents available. See, Senator Ervin at Congressional Record, Senate 89th Cong. Second Sess., Vol. 112, March 29, 1966, 6876, and June 27, 1966, 14378.

"These four bills have a common purpose, and that purpose is to provide a *more fair and equitable treatment for private individuals* and claimants when they deal with the Government or are involved in litigation with their Government." Rep. Ashmore,

dealt with equalizing the assessment of costs to the prevailing party. Congress sought to remove (and did remove) the existing disparity that: "When the United States is sued and wins, it may be awarded costs; [but] when the United States is sued and loses, costs may not be awarded against it."[16] Fairness and equality were mentioned again and again.

The new requirement that all claims, including those over $2,500 be submitted to the relevant administrative agency was not designed to foil litigants, but rather to save time and money and encourage the settlement of meritorious claims early.[17] Totally absent from the discussion in either the House or Senate was any suggestion that strict compliance with the formalities of the administrative submission was essential to the validity of a suit. Indeed, instead of a stick, Congress employed a carrot, by attempting to sweeten the attractiveness of the administrative remedy by increasing the fees recoverable by

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Congressional Record, House, 89th Cong. Second Sess. Vol. 112, June 6, 1966. H.R. 12259. (emphasis added)

[16] Sen. Ervin, Congressional Record, Senate, 89th Congress, Second Sess. Vol. 112, April 1, 1966, 7375. "The present law permits a disparity of treatment between private litigants and the United States concerning the allowance of court costs. . . . This bill will correct this disparity by putting the private litigant and the United States on the same footing as regards the award of court costs to the prevailing party in litigation involving the Government." Congressional Record, Senate, 89th Cong. Second Sess. Vol. 112, June 27, 1966, 14376.

[17] "This bill would institute a procedure under which all claims would be brought to the appropriate agency for consideration and possible settlement before court action is instituted. A claim would first be considered by the agency whose employee's activity allegedly caused the damage and which possesses the greatest information concerning that activity. As a result, meritorious claims would be settled more quickly, without the need for expensive and time-consuming litigation or even for filing suit." Sen. Ervin, Id. at 7375.

attorneys.[18] Congress thereby endeavored to facilitate remedies for meritorious claimants.

Efficiency and compassion,[19] not minefields for the unwary were the objectives.[20] While Congress hoped to minimize the necessity of court action, nowhere did it expressly state court actions could be barred by procedural defaults (other than substantive exhaustion of the administrative route, a route that contained but a 6 month built in delay, and a route Mr. McNeil fully traveled).

Senate Report No. 1327 summarized the purposes involved in the requirement of administrative presentation of a claim, suggesting that it was partially based on the precedents of municipal statutes which required notice prior to suit:

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[18] Senator Ervin stated: "Finally, in order to encourage claimants and their attorneys to make use of this new administrative procedure, the attorney's fees allowable under the act would be raised from the present 10 percent of the administrative award and 20 percent of the settlement of judgment after filing suit to 20 and 25 percent respectively." Id. at 7375.

[19] "After the litigation is started, that is, when a suit is filed, the expense of course, increases for all parties. The claimant might be seriously injured or suffering from a loss of his property and in need of money." Congressional Record, House, 89th Cong. Second Sess. Vol. 112, June 6, 1966, H.R. 12259.

[20] Rep. McClory stated: "This measure . . . will enable claimants who have meritorious claims against the Federal Government to have them disposed of more expeditiously and at the same time to have them reviewed just as thoroughly as they are at the present time. . . . This measure, while it, *of course, continues to give the right to a person to file suit against the Federal Government*, nevertheless provides for a better method of settlement without the necessity of court action. . . . There are a great many claims these days and the effect of this legislation would be to facilitate their settlement through the use of administrative law procedures." Congressional Record, House, 89th Cong. Second Sess. Vol. 112, June 6, 1966, H.R. 13650. (emphasis added)

> "The requirement of an administrative claim as a prerequisite to suit has numerous precedents in statutes governing tort claims against municipalities. These laws often provide that a municipality must be given notice of an accident within a fixed time. The purpose of this notice has been summarized as being–
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> " * * * to protect the municipality from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit. (McQuillin, Municipal Corporations (3rd Ed.), section 53.153)."[21]

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[21] Senate Report No. 1327, 89th Cong. Second Sess. (1966), reprinted in Cong. & Admin. News, 2515 (1966). Specific references were made to the District of Columbia Code section 1-923 which required notice in writing plus waiting 6 months, and State of Iowa legislation under which claims must be presented to a state appeal board and no suit permitted unless the appeal board has made final disposition. (The Iowa statute has since been amended to allow suit 6 months after notice.)

Part of the reason for the change was that it had been discovered that failure to grant authority to agencies to settle cases for amounts over $2,500 meant that suits were encouraged, often in situations in which a negotiated settlement was possible soon after the formal filing of suit. However, the agency previously had no authority to settle prior to such a filing.

The committee report stated: "There is good reason to believe that even in many of these cases a claimant may decide to file suit because of the present limits upon administrative settlement. This is because as soon as the case is filed, the government can negotiate a settlement without regard to that limitation [$2,500]. It does not appear that this procedure is conducive to efficient claims administration. The filing of the suit and the consequent expense to the Government in preparing the case would appear to be unnecessarily involved when the case is a proper one for early settlement."

While reduction in court case load was one objective, neither the legislative report nor Congressional discussion indicate that a single Congressperson contemplated or intended that an incorrect early filing of a suit would prejudice the private claimant. Indeed, one explicit purpose was to give the Civil Division of the Justice Department more time to devote to more serious and complex cases such as Mr. McNeil's.[22] Mr. McNeil's allegations involving medical experimentation, with overtones of the infamous Tuskegee syphilis experiments,[23] fall squarely into the category of cases for which Congress intended such additional attention by encouraging many simple cases to be settled prior to suit. Congress clearly sought to strike a better balance between settlement in the administrative agency and litigation in court. Nowhere did Congress express an intent to bar the courtroom door for cases which could not be settled administratively.

Moreover, Mr. McNeil gave the agency two notices of his claim and received one explicit sum certain denial [indeed, it is unclear in the record that the agency ever responded to the first claim] and also more than 6 months after the first notice of claim, requested of the district

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[22] "Agency settlement of a substantial numbers of tort claims [which] would enable the Civil Division to give greater attention to those cases which involve difficult legal and damage questions in such areas a [sic] medical malpractice, drug and other products liability, and aviation accidents. These areas of litigation are expanding at a steady pace. . . .

It is obvious that there will be some difficult tort claims that cannot be processed and evaluated in this 6 months period. The great bulk of them, however, should be ready for decision within this period. . . . Some [claimants] may keep on negotiating, even then, but the idea of extending the limitations period was rejected." Congressional Record, Senate, 89th Cong. Second Sess. Vol. 112, June 27, 1966. 14377-78

[23] Jones, Bad Blood: The Tuskegee Syphilis Experiment, Free Press, & Collier Macmillan 1981.

court that he "can properly commence his suit." Jt.App.10. For unexplained reasons, the court did nothing for 8 months. Final dismissal of the suit took another 9 months. By any reasonable measure, the agency has had adequate notice, adequate opportunity to investigate, adequate opportunity to settle if it wished, and did in fact explicitly deny one of Mr. McNeil's claims.

D. The Legislative History of the specific Federal Tort Claims Act Provisions Regarding Time for Instituting Suit Accord with the General Remedial Purposes of the Act

Congress specifically expressed its desire to expand FTCA litigation in 1949 by lengthening the time for bringing suit to two years. While doing so, Congress rejected agency pleas that special defenses be available to the government. Only defenses available to private defendants were supposed to be available to the government.

i) Congress expanded the time for suit to two years and in doing so it indicated a desire to make FTCA litigation more like ordinary civil litigation

Congress demonstrated a specific intention to expand litigation under the Federal Tort Claims Act by enlarging the time to institute suit, and indicated while doing so a conscious design to make F.T.C.A. litigation more like ordinary civil litigation. See, House of Representatives Report 81-276, P.L. 81-55, Federal Tort Claims Act – Time for Bringing Suit, 81st Congress, 1st Sess., 1949 WL 1677 (Legis. Hist.) (March 21, 1949) (Only Report on this legislation) The reported bill (inter alia) enlarged the time for filing suit from 1 year to 2 years from the date of accrual

of an action.[24] In response to various federal agencies that opposed the change on grounds that it would "jeopardize the defenses of the Government in tort suits" the committee report replied, *"No clear distinction can be seen between the accessibility of defenses to the Government than to ordinary law or private defendants."* (1949 WL 1677, p. 5)[25]

The clear import of the 1949 Congressional Committee Report is that F.T.C.A. suits against the federal government should be as similar as possible to suits against ordinary defendants. The federal government was not

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[24] In justification of the proposed changes (enacted in 1949), the report stated: "The committee feel that, in comparison to analogous State and Federal statutes of limitation, the existing 1-year period is too short and tends toward injustice in many instances. For example, an analysis of the statutes of limitation of the 48 States and the District of Columbia reveals that the average limitation period provide for personal injury cases is 2.96 years, for property damage claims it is 3.90 years, and for cases of death by wrongful act it is 1.90 years. The over-all combined average is, accordingly 2.92 years, and this over-all average is the one to which the Tort Claims Act limitation should be compared with since the Tort Claims Act covers all three types of torts under one inclusive period of limitation. . . . Federal statutes providing time limitations for the bringing of tort actions indicate an over-all average of 2.2 years. . . . It will be observed, then, from the foregoing statistics, that the existing 1 year limitation is manifestly unjust and not in consonance with the practice prevailing in analogous departments of the law." (1949 WL 1677, pp. 3-4)

[25] The report concluded with a paragraph as follows: "It is not the intention of the Federal Government to deprive tort claimants of their day in court or of their remedies. Nor, on the other hand, does it propose to encourage delay in the enforcement of a claimant's rights or to harass the Federal agencies in their defense against such suits by increasing the difficulty of their procurement of evidence. . . . The period of 2 years proposed in the bill represents a happy medium which has been tested and found satisfactory in the laboratory of legal experience." (1949 WL 1677, pp. 5-6.)

supposed to receive special defenses, procedural defenses in particular, that were not available to other defendants.

Denial of Mr. McNeil's right to sue would have just the effect that the Congressional Committee report abjured; Mr. McNeil would be denied his day in court and the federal government would have a "special defense." It would not be enough to "cut square corners" when dealing with the federal government, those corners would have to be cut in the precise order (clockwise – fine, the suit proceeds; counterclockwise – no! Go back and do it again!) There is simply no legislative history supporting conversion of F.T.C.A. litigation into grand games of "Mother May I."

ii. The interrelated development of Sections 28 U.S.C. sec. 2401b and 2675 supports a practical not a hypertechnical interpretation of section 2675.

Two statutory sections, current sections 28 U.S.C. sec. 2401(b) and 2675, are central to the issue in the case at bar. The textual development of neither section supports a "hypertechnical" reading. Indeed, a practical, common sense interpretation appears more appropriate, one which suggests Mr. McNeil has fully complied with all substantial and substantive requirements of the F.T.C.A. so as to permit his suit to proceed.

a) Section 2401 statutory development:

The origin of the current text of the Federal Tort Claims Act Section 2401(b) began with section 420, 60 Stat. 845 (79th Cong. 2nd sess) August 2, 1946 (App. 6) which read:

> "Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in

writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to *institute* a suit pursuant to part 3 of this title *shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal* of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period." (emphasis added)

Section 410 gave the claimants the right to withdraw a claim from a Federal agency by giving 15 days notice in writing.[26] In 1949 a revision of the first sentence of 2401 (b) extended the one year period for most suits to 2 years. 63 Stat. 62 (81st Cong. 1st sess.) (April 25, 1949) (App. 12). In 1959 all references to $1,000 were changed to $2,500. Pub.L. 86-238, 73 Stat. 472 (86th Cong. 1st sess.) (Sept 8, 1959) (App. 14). In 1966 the text of section 2401(b) took its

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[26] The 1946 language was codified in 1948 by 62 Stat. 971 (80th Cong. 2nd sess) (June 25, 1948) (App. 8) in subsection (b) in section 28 U.S.C. section 2401 to read as follows: "A tort claim against the United States shall be forever barred unless action is begun thereon within one year after such claim accrues, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within one year after such claim accrues. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until after the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim."

current form, by eliminating all distinctions to amounts below and above $2,500 and thus requiring submissions of all claims to the "appropriate Federal agency." Pub. L. 89-506, 80 Stat. 307, (89th Cong. 2nd sess.) (July 18, 1966) (App. 15).

b) Section 2675 statutory development

The statutory origin of the current text of 28 U.S.C. section 2675 began with section 420 quoted above and also with section 410(b) of 60 Stat. 844 (Aug. 2 1946) (79th Cong. 2nd sess) (App. 4) which read in part as follows:

> Sec. 410(b) No suit shall be *instituted* pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: *Provided*, that the claimant may, upon 15 days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section:. . . .[27] (emphasis added)

Stat. 843 (App. 4)

Sections 420 and 410b were codified by 62 Stat. 983, (80th Cong. 2nd sess) (June 25, 1948) (App. 11) into 28 U.S.C. section 2675. The section then read:

> *2675: Disposition by federal agency as prerequisite: evidence*
>
> a) An action shall not be *instituted* upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the

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[27] Part 2 of the title conferred the authority upon the head of a federal agency or his designee to consider, ascertain, adjust, determine and settle claims for money damages for under $1,000. 60 Stat. 843 (App. 2)

government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.

b) The claimant, however, may upon 15 days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this subsection shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.[28] (emphasis added)

c) Section 2675 as an evidentiary statute

It is worth noting that section 2675 as codified in 1948, with its internal and caption reference to various matters of evidence (limiting suits to the amount of the original demand unless a limited category of newly discovered evidence justifies exceptions) generally expanded the scope of possible claims by an individual. No language explicitly precluded suit.

Moreover, the "evidence" caption unmistakably refers to subsections (b) and (c). If that caption is also read to refer to section (a), it would suggest that the proof

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[28] After a minor (and irrelevant) change in 1949 (63 Stat. 107, (May 24, 1949)), (App. 14) section 2675 took its current form in 1966 with the enactment of 80 Stat. 306, Pub. L. 89-506 (July 18, 1966) (App. 16).

of such agency notification was also an evidentiary matter, not a jurisdictional matter. (The maxim *noscitur a sociis* applies). As such, a technical failure to exhaust would not deprive the court of jurisdiction, but simply subject such suits to potential dismissal if the government makes a timely motion to that effect. However, premature filing could be cured by evidentiary demonstration that the exhaustion requirement had in fact been fulfilled.

The close interrelationship between subsections (a) and (b) is best illustrated by the preconditions for filing suit involving claims under $1,000. Before *instituting* claims for such money damages a claimant was required to either have received the required final agency action (2675 (a)), or alternatively submit a fifteen day written notice of withdrawal of the claim (2675 (b)). In either situation specific documentary evidence would be available to demonstrate statutory compliance – either a copy of the final agency denial or else the written withdrawal notice. It is reasonable that Congress did not intend any peculiar procedural trap for those unversed in the law by the language of section 2675 (a) but simply meant and intended what it said, that the fact of withdrawal from the agency and/or final agency action be able to be *evidenced* to the court. Either of these documents would demonstrate to the court that the opportunity for investigation and/or settlement negotiation had been accorded the Government.

In this connection, recall the statement by the Congressional Committee Report discussed above at note 25 and accompanying text, rejecting pleas by various federal agencies for retaining the shorter (one year F.T.C.A.) statute of limitations, *"No clear distinction can be seen between the accessibility of defenses to the Government than to ordinary law or private defendants."* (1949 WL 1677, p.5) That *explicit* rejection of the concept of "special" treatment for the federal governmental as defendant has never been specifically disaffirmed. (Recall also, President Roosevelt's 1942 message to Congress advocating the Federal

Tort Claims Act "as a means of dispensing justice simply and effectively to tort claimants against the Government." Supra n.7)

After the 1966 amendments (App. 16) (which retain both the words *evidence* and *instituted* from the 1948 codification), proof of compliance with the statutory requirements of notice are similarly available in simple evidentiary form. The claimant may be required to disclose his original sum certain demand letter (if suit is predicated upon the 6 month period of non-response) or else the sum certain denial. By August, 1989, Mr. McNeil had accomplished and evidenced both to the court.

II. Examination of Case Law Regarding Analogous Notice Provisions in Municipal Statutes Indicates that Many Courts have Construed such Notice Provisions Against the Municipality and Not Against the Claimant.

Ordinarily, of course, this court would not pay particular attention to state court decisions while it interprets a federal statute. However, the peculiar federal statutory provision at issue in the case at bar contains explicit statutory history (*See, supra*. note 21 and accompanying text) indicating that Congress itself legislated with direct attention to state statutes involving notice provisions and suits against municipalities. For that reason it appears appropriate to review such references, even though most of the caselaw has to do with the adequacy of notice to municipalities, rather than prematurely filed suits. The question is whether strict enforcement of such notice statutes is appropriate against claimants. There is a substantial body of case law standing for the opposite proposition, and in favor of strict construction against the municipalities so as to accord substantial justice to claimants.

McQuillin[29] indicates that while there is a split of authority on the matter, it is clear that many state courts construe similar "municipal" notice[30] requirements strictly against the Government and not against the Claimants. Antieau states: "Technical accuracy in filing claims is not necessary, and the older doctrine of strict and literal compliance, with its attendant harsh and unfair results, has virtually disappeared from the law."[31]

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[29] The Law of Municipal Corporations, McQuillin, 3rd Ed. (1984), section 53.152, at p. 730: "[T]he statements in the cases as to whether they should be construed strictly or liberally are not altogether harmonious. It has frequently been announced that such laws should be strictly construed, or construed strictly against the municipal corporation and liberally construed in favor of the individual required to give notice, or that they should be liberally construed." (footnotes omitted) *Meisenheimer v. Chester*, 15 Ill.App.3d 1088, 1090, 305 N.E.2d 322, 324 (Ill.App. 5th Dist. 1973) ("the Local Governmental and Governmental Employees Tort Immunity Act is in derogation of the common-law action . . . and must, therefore, be strictly construed against the local public entity."; Accord, *Miles v. City of Richmond*, 236 Va. 341, 344, 373 S.E.2d 715, 717 (Vir. 1988); *West Omaha Investments v. Sanitary and Improvement Dist. No. 48 of Sarpy County*, 227 Neb. 785, 420 N.W.2d 291, 293, 295 (1988)

[30] On some occasions, "filing an action for damages by the claimant within the time for giving notice, has been held sufficient to excuse failure of timely notice, since the clear purpose of the requirement to encourage early investigation of the claim at a time when the matter is still fresh, witnesses are available, and conditions have not materially changed, is thus well served." 18 McQuillin, Law of Municipal Corporations, sec. 53.154, p. 739 (1984) citing, *Dunbar v. Reiser*, 64 Ill. 2d 230, 356 N.E.2d 89 (Ill. 1976)

[31] 2 Antieau, Municipal Corporation Law, sec. 16.09, p. 16-24 (1992) Iowa, for example, held unconstitutional a notice of claim statute that required notice within 60 days as violative of the equal protection clauses of the federal and Iowa constitution by discriminating arbitrarily between victims of governmental

For example in, *Galbreath v. City of Indianapolis*, 253 Ind. 472, 255 N.E.2d 225 (1970) the Indiana Supreme Court interpreted service of notice upon the city attorney as adequate notice to the mayor although the statute explicitly required service on "the mayor . . . or clerk of any such city or a member of the board of trustees of any such town. . . . " 255 N.E.2d 226. The Indiana Supreme Court construed the Indiana statutory provision as, "Constituting a limitation on a common law duty, [that] must be strictly construed against such a limitation." 225 N.E.2d 228. Substantial compliance with the notice statute was adequate. This rule, the court observed, had in fact been tacitly applied in numerous cases cited at 255 N.E.2d 228. While sustaining the adequacy of the notices as given, even though not served upon the mayor, the court "took judicial notice of the fact that city government today is extremely complex." 255 N.E.2d 229. (Yet how much more complex is federal government?) Service

torts and victims of private torts. *Miller v. Boone County Hosp.*, 394 N.W.2d 776, 780 (Iowa 1986). The Iowa Supreme Court explicitly joined the decisions in *Reich v. State Highway Department*, 386 Mich. 617, 194 N.W.2d 700, 702 (Mich. 1972) (60 days); *Turner v. Staggs*, 89 Nev. 230, 235, 510 P.2d 879, 882-83 (Nev. 1973), cert. denied 414 U.S. 1079 (1973) (6 months too short); *Hunter v. North Mason High School*, 85 Wash. 2d 810, 539 P.2d 845 (1975); *O'Neal v. City of Parkersberg*, 160 W.Va. 694, 237 S.E.2d 504 (W.Va. 1977) (30 days for notice unconstitutionally short); see also, *Lepon v. Tiano*, 181 W.Va. 185, 381 S.E.2d 384 (W.Va. 1989) (6 month notice statute violated equal protection and due process at a time West Virginia had waived sovereign immunity). But see, *Fritz v. Regents of the University of Colorado*, 196 Colo. 335, 586 P. 2d 23 (Colo. 1978) (sustaining constitutionality of 90 day notice requirement) (citing inter alia an Iowa decision, *Lunday v. Vogelmann*, 213 N.W.2d 904 (Iowa 1973) which was subsequently overruled by *Miller v. Boone County Hospital, supra*); *compare, King v. Johnson*, 47 Ill.2d 247, 265 N.E.2d 874 (Ill. 1970) (6 month statute doesn't violate Illinois Constitutional prohibition of special privilege and immunities or special laws).

upon the city attorney as agent was held adequate, even though no specific language permitted such service. See also, *Scott v. Gatson*, 492 N.E.2d 337 (Ind. App. 1986) (no trap for the unwary); *Lawrence County Commissioners v. Chorely*, 398 N.E.2d 694, 697 (Ind. App. 1979)(Substantial compliance suffices, but acts and conduct of defendant can create a waiver of notice or an estoppel).

Similarly in *Bush v. City of Albany*, 125 Ga. App. 558, 188 S.E.2d 245 (Ga. App., 1972) notice that omitted the name of the claimant was held adequate. Georgia courts had also held that the notice statute "is in derogation of the common law, and must be strictly construed against the municipality." 188 S.E.2d 247 (See also cases cited) *Accord, Tanner v. City of Gainesville*, 162 Ga.App. 405, 290 S.E.2d 541 (Ga. App. 1982).[32] The *Bush* court stated: "technical accuracy in filing claims is no longer necessary, and the old doctrine of strict and literal compliance, with its attendant harsh and unfair results, has virtually disappeared from the law. What is required is that there be substantial compliance with a demand or claim requirement." 2 Antineau (sic), Municipal Corporation Law, Section 16.06, p. 472." 188 S.E.2d 248. A construction, "[S]hould not be given . . . as will defeat the ends of justice." 188 S.E.2d 248.

The Missouri Supreme Court agreed long before the initial enactment of the FTCA that a notice statute should be construed liberally in favor of the claimant and strictly against the municipality as a statute in derogation of the common law. *Glasgow v. City of St. Joseph*, 353 Mo. 740, 747, 184 S.W.2d 412, 414 (1944) *Glasgow* dealt with notice

[32] *Tanner v. City of Gainsville* dealt with both the adequacy of the notice in terms of content, finding substantial compliance, and also found the factual issue of whether the city had received the letter, created an issue of fact given the presumption that a properly addressed envelope, mailed with proper postage affixed, was received. 290 S.E.2d 544. See also cases cited at 290 S.E.2d 543.

of an accident (which had been given), from which death resulted at a later time (no notice given prior to suit). The statutory notice provisions were construed not to apply to the new cause of action from wrongful death which only sprang into existence at the time of death. 184 S.W.2d 415-416. Followed, *Lemming v. City of Salisbury*, 765 S.W.2d 271 (Mo. App. 1988)

Technical niceties are not required for notices in the District of Columbia. See, *Pitts v. District of Columbia*, 391 A.2d. 803 (D.C. App., 1978) (Oral notice to security guard in public housing project inadequate, but police reports were adequate.) "Precise exactness is not absolutely essential." 391 A.2d 807. Accord, *Hardy v. District of Columbia*, 616 A.2d 338 (D.C. App., 1992) (letter describing site of accident within 75 feet held adequate to allow the District to investigate the claim, to facilitate settlement of meritorious claims, and to correct defective conditions).[33] See *Washington v. District of Columbia*, 429 A.2d 1362, (D.C. App., 1981) (strict construction "to effectuate its legislative purpose because it is in derogation of the common law." at 1370).

The purposes of such notices included protection of municipalities against spurious claims. However, "It never was the intention of the legislature that this [notice] section was to be used as a sword to defeat the rights of a person having a legitimate claim. Its purpose was a shield to protect the municipality against spurious claims."[34]

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[33] "[A] substantial compliance with the statute, according to the weight of authority, is all that is required. . . ." McQuillin, supra, at sec. 53.163, p. 789. "A notice which is merely defective may be amended where there was no purpose to mislead the municipality, and in the absence of prejudice to the defendant, and this is particularly true under remedial statutes designed to prevent injustice. . . ." McQuillin, supra, at sec. 53.170, p. 814.

[34] McQuillin, supra, at sec. 53.153, p. 735, incorporates this language citing *Hopkins*. (Incorrectly naming and giving notice to the "East Syracuse Fire District," a nonexistent entity held

Hopkins v. East Syracuse Fire Department, 267 N.Y.S.2d 61, 49 Misc. 2d 197 (City Ct. of Syracuse, 1966) See also, *City of West Plains, Missouri v. Loomis*, 279 F.2d 564, 566 (8th Cir. 1960) (Prime object of the [Missouri] statute [was] to protect the city against fraudulent or stale demands.) "[T]he statute should be construed reasonably. Its design is to defeat unjust demands, not to lay pitfalls in the way of honest claimants. The city may use it as a shield, not as a sword. . . . " 279 F.2d 566.

III. Several District Courts Have Held that Substantial Compliance with Notice Requirements Comports with Congressional Intent for Federal Tort Claims Act Actions

Several federal district courts[35] have addressed similar problems of adequacy of the notice under the Federal Tort Claims Act itself.

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inadequate, but refiling permitted, municipalities possibly estopped from setting up a defense of failure of notice, plaintiff free to file a new action.)

[35] See also the initial opinion in *Kokaras v. United States*, 750 F.Supp. 35 (D.N.H. 1990). A claim was held effective despite omission of the specific amount of damages demanded, and effective both as to husband and wife, even though only the husband signed the Form 95 notice in *Kokaras v. United States*, 750 F.Supp. 542 (D.N.H., 1990), subsequent decision at 791 F.Supp. 35 (D.N.H. 1992) affirmed in part, reversed in part, 980 F.2d 20 (1st Cir. 1992) (omission of a sum certain demand for personal injury during two year period meant no adequate notice given on that claim, property damage claim held adequate). (See also cases cited at 750 F.Supp. 544 - 545.) The district court stated, "Relevant legislative history supports a liberal construction of the exhaustion requirement. Congress had two main purposes in enacting s. 2675(a) of the FTCA. First, Congress sought to 'ease court congestion and avoid unnecessary litigation, while making it possible for the government to expedite the fair settlement of tort claims asserted against the United

Detailed analysis of the legislative history of the Federal Tort Claims Act is contained in *Koziol v. United States*, 507 F.Supp. 87 (N.D. Ill. 1981). The court in *Koziol* rejected requirements of strict technical compliance with notice requirements. Indeed, the *Koziol* opinion contains analysis of the legislative history of the Federal Tort Claims Act quite similar to that of Part I of this brief. The Federal Tort Claims Act, according to the opinion by Judge Moran, was not designed, "' . . . to spare the Court the burden of trying cases . . . ' i.e., a provision for the relief of judges and courts. Rather, the Congress specifically stated that the [1966] amendments had ' . . . the common purpose of providing more fair and equitable treatment of private and individuals and claimants when they deal with their Government.' " 507 F.Supp. 90. The court described the cases upon which the government relied as a reflection of the reluctance to let go of the incidents and language of the concept of sovereign immunity.

> *"But Congress expressly did waive that immunity in cases of this nature. It evidenced no intention that the courts should act with greater rigidity with respect to claims against the sovereign than with respect to claims against the sovereign's ministers or servants."* 507 F.Supp. 91. (Citations omitted)

States. Second, Congress wanted to provide "fair and equitable treatment of private individuals and claimants when they deal with the government or are involved in litigation with the government. . . . Moreover, it seems fair to conclude that the FTCA is 'intended to provide a framework conducive to the administrative settlement of claims, not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits.' " 750 F.Supp. 545. (citations omitted) The First Circuit held the sum certain demand inadequate in part.

IV. *Hallstrom v. Tillamook County* Should not Control the Case at Bar Because the Statutory History, Purposes and Text are All Substantially Different

A. The Statutory History and Text of Federal Environmental Statute Notice Provisions Differs From the Statutory History and Text of the Federal Tort Claims Act Notice Provision

Virtually all of the statutes referred to by Justice O'Connor's opinion for the court in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) are environmental statutes patterned after the Clean Air Amendments of 1970.[36] See n. 1, at 493 U.S. 22 (1989). The 1970 Act appears in no way to have been patterned after the Federal Tort Claims Act but reflects the desire to empower private "attorneys generals." RCRA, which was patterned after the 1970 Act provisions, thus exemplifies a completely separate historical development from that of the issues in the case at bar. Not a single mention could be located in debate of these environmental statutes that refers to the administrative presentation and notice requirements of the Federal Tort Claims Act.

The relevant language of the RCRA statute was: "No action may be *commenced* under paragraph (a)(1) of this section (1) prior to sixty days after the plaintiff has given notice of the violation A) to the Administrator of the EPA, B) to the state in which the alleged violation occurs; and

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[36] The Federal Tort Claims Act was not mentioned in any of the briefs to this court in *Hallstrom*. See also the *amicus curiae* brief by the Solicitor General in *Hallstrom* which cites only environmental statutes with the exception of a responsive argument (at p. 10) to an E.E.O.C. argument raised by petitioner in relation to *Zipes v. Trans World Airlines, Inc.* 455 U.S. 385 (1982). *See*, 493 U.S. 27. The 1970 Act was the *first* citizen suit environmental statute. *See*, Solicitor General *amicus brief* in *Hallstrom* p. 11.

C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order, ... " 42 U.S.C. Section 6972(b)(1) (1982 ed.) (emphasis added)

That language differs from the FTCA language, "An action shall not be *instituted* upon a claim. . . . " 28 U.S.C. § 2675(a). (emphasis added)

This Court pointed out in *Hallstrom* that the word "commenced" was identical to the language of Rule 3 of the Federal Rules of Civil Procedure that states "a civil action is commenced by filing a complaint with the court." 493 U.S. 26. The language of RCRA was read "in light of this rule." 493 U.S. 26.

In *Hallstrom* this Court also observed that Congress had explicitly carved out an exception from the RCRA bar on prematurely filed suits by 1984 amendments to RCRA, See, e.g. 42 U.S.C. § 6972(b)(1)(A) (1982 ed.), but the court pointed out that no exception applied to the situation in *Hallstrom* and the court asserted no ability to carve out an exception when Congress had declined to do so. 493 U.S. 27.[37]

Most importantly, however, this Court stated, "Nor will the dismissal of this action have the inequitable result of depriving petitioners of their "right to a day in court. . . . Petitioners remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards." 493 U.S. 32. Exactly the opposite is the case for the Petitioner in the instant case. Partly because the case "was lost in the mass of prisoner litigation," Jt.App.20. Mr. McNeil is long out of time to refile his case.

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[37] Moreover, this court noted that the case had been filed by a lawyer (indeed, a lawyer who at oral argument before the Supreme Court admitted his inadvertent neglect in failing to notify the state and federal agencies), as were most RCRA lawsuits. [McNeil proceeded pro se.]

No argument exists against Mr. McNeil's right to proceed that is analogous to the "balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." 493 U.S. 29.[38] By contrast instead of expressing a desire to eliminate suits from courts, Congress's explicit purpose in enacting the FTCA was to put such matters in court. Congress found this far preferable to private bills cluttering up its legislative docket.

B. The Language Congress Employed in the Federal Tort Claims Act Differs from that Used in the Environmental Statutes: The Definition of "Institute" in 28 U.S.C. sec. 2675 is Different from that of "Commence" as used in RCRA sec. 6972(b)

It is well settled that "the starting point for interpreting a statute is the language of the statute itself. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.* 447 U.S. 102, 108 (1980)." *Hallstrom* 493 U.S. 25.

When Congress uses two different words, a presumption should not arise that the same meaning was intended to attach to both words. The dictionary definitions of the words *institute* and *commence* are consistent with Congress intending a different meaning to be given to the two different words in the F.T.C.A. and in RCRA.

Websters Seventh New Collegiate Dictionary (1971) defines the verbs *commence* and *institute* as follows:

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[38] "Requiring citizens to comply with the notice and delay requirements serves this goal in two ways. First, notice allows Governmental agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits. . . . Second, notice gives the alleged violator 'an opportunity to bring itself into compliance with the Act and thus render unnecessary a citizen suit.' " 493 U.S. 29.

Institute 1: to establish in a position or office 2 a : to originate and get established : ORGANIZE b : INAUGURATE, INITIATE

Commence (verb transitive) 1 : to enter upon : BEGIN 2 : to initiate formally by performing the first act of (verb intransitive) 1 : to have a beginning : START 2 : chiefly Brit.: to begin to be or to act as 3 : chiefly Brit. : to take a degree at a university (syn) see BEGIN

The terms are distinct, not identical, albeit similar, as illustrated by the reference to "initiate" in both definitions. The reference to "finally initiate" in the definition of commence captures the precise use of "commence" employed both in Rule 3 of the Federal Rules of Civil Procedure, and as interpreted by this court in *Hallstrom*. No such reference occurs with respect to "Institute," the language of F.T.C.A. section 2675. Indeed, the first applicable dictionary meaning of institute is: "to originate and get established." Such a meaning is literally quite consistent with the decisions of the circuits that permit perfection of a filing before substantial progress occurs.

There is a significant, and precisely relevant, difference between such "final initiation" i.e. filing of a complaint, and the looser requirements of "to originate and get established, organize, inaugurate, initiate." Commence implies a more precise point of time than does institute. To organize, except for the simplest process, necessarily involves and implies a period of time, oft times a prolonged period of time. For example, the invasion of Nazi dominated France "commenced" on D-Day, however, it makes sense to assert that it was instituted months or years earlier by the planning process and the process of bringing men and material together to "commence" the physical landings on the beaches from ships or behind the coast through parachutes and gliders. Similarly, it is proper usage to describe the resupply of ammunition and other goods after D-Day prior to the break out of the beach fronts as part of the "institution" of the invasion of Nazi occupied France. One could not

say, however, that such resupply "commenced" the invasion.

Similarly, the customary language (and policy) differs regarding environmental suits, which were described as "citizen-suits," (Solicitor General Amicus Brief in *Hallstrom* p. 11) from the customary language of Federal Tort Claims Actions which involve "claimants."[39]

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[39] The Solicitor General's amicus curiae brief in *Hallstrom* suggested that premature litigation discourages settlement as positions become hardened. p. 13-14. The history of the Federal Tort Claims Act not only is devoid of any such references to "fears of hardening positions," by contrast, Congress specifically addressed a related problem in the Federal Tort Claims Act during consideration of the 1966 amendments. Prior to those amendments suit had first to be filed to permit negotiated settlements to occur for amounts over $2,500. One of the objectives of the 1966 amendments was to permit more administrative settlements, for the agency authority to settle was expanded by these amendments. Once suit was filed, the agencies had previously been permitted to settle for amounts over $2,500. Congress considered and rejected the idea of extending the time for negotiation in complex cases. The right to resort to suit was explicitly chosen to prevail over extended delays for the purpose of encouraging settlement. See Senate Report No. 1327 partially reprinted in the Congressional Record Senate, 89th Cong. Second Sess. Vol 112, June 27, 1966 at 14377 et seq. "Therefore even though this 6-month period may prove insufficient in some instances, the committee does not believe that this period ought to be enlarged to attempt to insure time for final decision on all claims. This is the same position stated by the Department of Justice at the hearing." 14378, U.S. Code Cong. & Admin. News, (1966) p. 2519. Thus the argument against suit because it might "harden positions" applies quite differently, if at all, to FTCA plaintiffs (and not at all to Mr. McNeil). Of course not one word in the legislative history of the Federal Tort Claims Act suggests that settlements were not to continue being available once suit was filed. Moreover, the slight increase in attorneys fees (from 20 to 25 percent upon filing suit) must be perceived as a substantial and practical check on any hardening

V. The Holdings of Circuits that Refuse to Permit Perfection of Filing if No Substantial Progress has Occurred, are based on Limited Examination of Legislative History, with No Attention Paid to the 1946 Waiver. The Holdings of Other Circuits Are More Consistent with the Intent of Congress as Expressed in the Federal Tort Claims Act that the Same Rights Should Apply for achieving the Objectives of Justice and Fairness

The opinions of the circuits that have held that premature filings are inadequate are virtually devoid of evidence of detailed examination of legislative history. See, *Gregory v. Mitchell*, 634 F. 2d 199, 204 (5th Cir. 1981) which cites S. Rep. No. 1327, and briefly refers to *Adams v. United States*, 615 F.2d 284 (5th Cir. 1980) at 634 F.2d 204, n.3; and *Reynolds v. United States*, 748 F.2d 291 (5th Cir. 1984) (which cites no legislative history but does cite *Gregory v. Mitchell); Jerves v. United States* 966 F.2d 517 (9th Cir. 1992) (which cites no legislative history); and *McNeil v. United States*, 964 F.2d 647 (7th Cir. 1992) (which cites no legislative history but is the only opinion to cite *Kubrick v. United States*, 581 F.2d 1092 (3rd Cir.), reversed, 444 U.S. 111 (1979)).[40]

The only circuit opinion that discusses the objectives of Congress (although in relationship to the adequacy of the notice provisions) is *Adams v. United States*, at 615 F.2d

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of negotiating positions for most FTCA claimants. The time and cost of trial are obviously substantial factors in the recommendations and conduct of attorneys representing tort claimants.

[40] This court in *Kubrick*, at 444 U.S. 121 n.6, did examine the legislative history in relationship to when a claim accrues. Of course, no allegation has been made that Mr. McNeil is out of time in relationship to the accrual of his action. However, statutes of limitation by definition terminate actions filed out of time. Certainly Congress intended this in the FTCA area. Statutes of limitations do not terminate prematurely filed actions.

288.[41] That opinion indicates that Congress had two purposes in enacting the notice requirement:

> 1) "to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States;" and,
>
> 2) "of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government."

In this particular respect these opinions differ little from those in *Celestine v. Veterans Administration Hospital*, 746 F.2d 1360 (8th Cir. 1984), *Kubrick v. United States*, 581 F.2d 1092 (3rd Cir. 1978), rev'd on other grounds, 444 U.S. 111 (1979), and the district court opinion in *Abernathy v. United States*, 732 F.Supp. 98 (D. Kan. 1990). None examines the legislative history in detail. However, each of these opinions have the common thread that they deal with the problem in a simple and practical manner, avoiding needless formalities, instead of resorting to metaphysics of the doctrine the king can do no wrong, a doctrine explicitly abandoned by Congress in 1946.

Obviously Mr. McNeil satisfied (twice) the obligation of bringing his claim to the attention of the federal agency. Moreover, he twice received what he thought were letters from the Government that permitted him to sue. Jt.App.10. Since his claim was denied, obviously litigation of his claim was in fact necessary for any possibility of recovery. The United States has had a full and

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[41] The legislative history examined by the court in *Adams*, however, appears to have been limited to that of the 1966 amendments. No attempt was made to put the Federal Tort Claims Act in context of its original enactment and as argued above, such contextualization suggests that Congress's purposes in relationship to the Federal Tort Claims Act are disserved, rather than served, by barring Mr. McNeil's suit.

fair opportunity to settle with him twice, and specifically declined to do so on one occasion, Jt.App.12 and also did so by de facto not responding within 6 months with respect to his original claim. Thus each of the considerations implicated by the first purpose was fully and adequately served by Mr. McNeil's actions.

Moreover, it is difficult to see how the purposes of providing more fair and equitable treatment of claimants when they deal with their government are served by dismissing a claim until more than a year after the claim became stale for refiling purposes. When the court system fails to act, and by such failure puts a litigant into situations such as that of the plaintiff in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), this court has acted to eliminate that clear unfairness.

Indeed, as a practical matter, had the United States district court ruled upon and not stayed the matter of Mr. McNeil's in forma pauperis filing, and or had the fact that Mr. McNeil had paid the filing fee been brought to the court's attention, the court might very well have promptly received a motion to dismiss (instead of an answer), and ruled upon it in time for Mr. McNeil to refile.[42]

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[42] The fact that an answer was filed prior to a motion to dismiss in this case may suggest that the government's own attorneys also had some initial difficulty understanding the application of the procedural bar, if any, of premature filing under the Federal Tort Claims Act. Of course, Mr. McNeil could not have located any precedent on the matter in the Seventh Circuit opinions available in the prison library since the decision in his case is the first in the Seventh Circuit.

VI. Every Purpose of Congress Actually Expressed in Enactment of the Federal Tort Claims Act and its Amendments would be Served by permitting Mr. McNeil's Suit to Proceed: The Opposite Rule Disserves Many Articulated Purposes in a Manner So as To Read Such Purposes out of a Statute Designed to Promote Justice

Since in any event the government will have to respond to "premature filings" by motions to dismiss, no additional cost to the government will be saved by dismissing prematurely filed suits if the agency had already rejected the claim or the six months have passed, except in cases in which refiling is precluded by the statute of limitations. Then the procedural step turns into an absolute bar, as it would in Mr. McNeil's case, unless resort is taken to a private bill in Congress. Nor is it a fair response to assert that the government has saved the claimant money and time in fruitless litigation, by tossing the valid claims out of court along with invalid claims.

Mr. McNeil sent a letter almost immediately after receiving his sum certain denial letter, stating that he desired to "commence" his litigation. Whether he intentionally or unintentionally employed the magic word of Rule 3 of the Federal Rules of Civil Procedure is unclear. However, the fact that he did was clear to Judge Ripple. Jt.App.31. Mr. McNeil may have thought, as many laymen would reasonably have thought, that he had done everything necessary to commence the litigation.

This letter should have been considered a supplemental pleading under Rule 15(d) of the Federal Rules of Civil Procedure. Since the 1963 amendment of that Rule, supplemental pleadings have been allowed for a variety of reasons even where an original pleading may be defective in that it fails to state a claim for relief. (6A Wright & Miller, Federal Practice and Procedure, Sec. 1496 & 1505 (1990)) Courts have allowed supplemental pleadings to be used to perfect premature filings. *See, Security Ins. Co. v. United States for Use of Haydis*, 338 F.2d 444 (9th Cir.

1964); *United States v. C.J. Electrical Contractors, Inc.*, 535 F.2d 1326 (1st Cir. 1976) (Miller Act cases). The United States has been permitted to supplement its original complaint. *United States v. Local 560*, 694 F.Supp. 1158, 1187 (D.N.J. 1988) No prejudice would accrue to the Government were Mr. McNeil permitted to do the same, indeed, no responsive pleadings were filed for over a year. (Indeed, Rule 15(a) could be used to construe the August, 1989 filing an amendment as of right.)

There is obvious unfairness in barring the court door to Mr. McNeil. His initial filing reacted to some letter that he obviously construed as a sum certain denial [most probably the FOIA letter denying that any documents could be located about any such experimentation]. Yet the overall purposes of the Federal Tort Claims Act was to provide fairness to claimants.

To deny Mr. McNeil a right to sue because he sued to soon, is a ludicrous rule were private defendants to raise it. Such a rule denies equal treatment for suits against the United States as against private defendants. That disserves another significant purpose of enactment of the Federal Tort Claims Act, that actions be the same as against private defendants.

To deny Mr. McNeil a right to sue because he failed to exhaust administrative remedies, when he thought the had exhausted them twice, can not prevent subsequent litigants form premature filings, for they too might receive a letter they believed was a sum certain denial, and "institute" litigation. Nor can such a rule conceivably be described as part of a "simple" remedy, another purpose of the Federal Tort Claims Act.

To deny Mr. McNeil a right to sue is to create a special defense, available only to the Government, not available to other defendants, a purpose Congress rejected time and time again in other contexts such as in attempts to resist the extension of the statute of limitations for Federal Tort Claims Act purposes to make it as

similar to comparable state statutes of limitations as possible. Special pleadings that the government needed such special defenses were simply rejected.

To deny Mr. McNeil a right to sue, denies the explicit statutory history indicating Congress looked at statutes and litigation involving suits against municipalities, and the general direction of decisions in this area requiring only substantial compliance with notice requirements. Such a denial rejects the view that many courts have taken that such statutes are in derogation of the common law and should be strictly construed against the municipality.

To deny Mr. McNeil a right to sue, denies the reality that although most tort actions against the United States are brought by lawyers, despite Congress's explicit encouragement of representation by raising the level of attorneys fees, some individuals still may be unable to get the ear of a lawyer for any number of reasons. Such individuals are forced to proceed pro se, but a basic purpose of the Federal Tort Claims Act was to attempt to make a remedy available both to the rich and the poor as a matter of right, and not as a matter of grace.

To deny prisoners, who may be the most frequent persons with limited access to lawyers and library material, the right to challenge alleged experimentation upon their bodies with some of the deadliest diseases known to man, smacks of willful concealment and coverup – exactly what Mr. McNeil must have thought was occurring when he was informed that no documents could be located about experiments which later were admitted to have occurred.

To deny Mr. McNeil a right to suit when the government has indicated no actual prejudice exalts form over substance and is difficult to reconcile with the essence of justice.

Lastly, to deny Mr. McNeil his right to suit requires both giving a meaning to the statutory language "institute" which is not one of the primary meanings of that

word, and rejecting the fact that Congress continues to use the word "instituted" from 1946 until today in 28 U.S.C. section 2675, despite Congresses repeated use of a different word, "commence," in environmental statutes for notice provisions, and despite this court's adoption in 1937 of similar language in Rule 3 of the Federal Rules of Civil Procedure. *See*, FTCA § 411 (App. 5).

CONCLUSION

Wherefore the Petitioner respectfully requests that this court reverse the decision of the United States Court of Appeals for the Seventh Circuit and remand this case for further proceedings upon the merits.

Respectfully submitted,

/s/ Allen E. Shoenberger
Court Appointed Counsel

60 Stat. 843 (August 2, 1946)
(79th Cong. 2nd Sess.)

TITLE IV – FEDERAL TORT CLAIMS ACT

PART 1 – SHORT TITLE AND DEFINITIONS

SHORT TITLE

SEC. 401. This title may be cited as the "Federal Tort Claims Act".

DEFINITIONS

SEC. 402. As used in this title, the term –

(a) "Federal agency" includes the executive departments and independent establishments of the United States, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States, whether or not authorized to sue and be sued in their own names: *Provided*, That this shall not be construed to include any contractor with the United States.

(b) "Employee of the government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

Part 2 – Administrative Adjustment of Tort Claims Against the United States

claims of $1,000 or less

Sec. 403. (A) Subject to the limitations of this title, authority is hereby conferred upon the head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, to consider, ascertain, adjust, determine, and settle any claim against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed $1,000, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death, in accordance with the law of the place where the act or omission occurred.

(b) Subject to the provisions of part 3 of this title, any such award or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud, not withstanding any other provision of law to the contrary.

(c) Any award made to any claimant pursuant to this section, and any award, compromise, or settlement of any claim cognizable under this title made by the Attorney General pursuant to section 413, shall be paid by the head of the Federal agency concerned out of appropriations that may be made therefor, which appropriations are hereby authorized.

(d) The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release by the claimant of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

report

Sec. 404. The head of each Federal agency shall annually make a report to the Congress of all claims paid by such Federal agency under this part. Such report shall include the name of each claimant, a statement of the amount claimed and the amount awarded, and a brief description of the claim.

Part 3 – Suits on Tort Claims Against the United States

jurisdiction

Sec. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances

where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: *Provided*, That the claimant may, upon fifteen days' notice given in writing, withdraw the claim from consideration of the Federal agency and commence suit thereon pursuant to this section: *Provided further*, That as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of

the claim. Disposition of any claim made pursuant to part 2 of this title shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

PROCEDURE

SEC. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505).

REVIEW

SEC. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal –

(1) In the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; or

(2) in the Court of Claims of the United States: *Provided*, That the notice of appeal filed in the district court under rule 73 of the Rules of Civil Procedure shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. Such appeals to the Court of Claims of the United States shall be taken

within three months after the entry of the judgment of the district court, and shall be governed by the rules relating to appeals from a district court to a circuit court of appeals adopted by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064) In such appeals the Court of Claims of the United States shall have the same powers and duties as those conferred on a circuit court of appeals in respect to appeals under section 4 of the Act of February 13, 1925 (43 Stat. 939).

(b) Sections 239 and 240 of the Judicial Code, as amended, shall apply to cases under this part in the circuit courts of appeals and in the Court of Claims of the United States to the same extent as to cases in a circuit court of appeals therein referred to.

COMPROMISE

SEC. 413. With a view to doing substantial justice, the Attorney General is authorized to arbitrate, compromise, or settle any claim cognizable under this part, after the institution of any suit thereon, with the approval of the court in which such suit is pending.

PART 4 – PROVISIONS COMMON TO PART 2 AND PART 3

ONE-YEAR STATUTE OF LIMITATIONS

SEC. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not

exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

EXCEPTIONS

SEC. 421. The provisions of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the government, whether or not the discretion involved be abused.

(b) any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of

any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C., title 46.secs. 741-752, inclusive), or the Act of March 3, 1925 (U.S.C., title 46, secs. 781-790, inclusive), relating to claims or suits in admiralty against the United States.

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62 Stat. 971 (June 25, 1948)
(80th Cong. 2nd Sess.)

§ 2401. Time for commencing action against United States

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless action is begun thereon within one year after such claim accrues, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within one year after such claim accrues. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the

agency or the date of mailing notice by the agency of final disposition of the claim.

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62 Stat. 983 (June 25, 1948)
(80th Cong. 2nd Sess.)

§ 2672. Administrative adjustment of claims of $1,000 or less

The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award or determination shall be final and conclusive on all officers of the government, except when procured by means of fraud.

Any award made pursuant to this section, and any award, compromise, or settlement made by the Attorney General pursuant to section 2678 of this title, shall be paid by the head of the federal agency concerned out of

such agency's appropriations therefor, which appropriations are hereby authorized.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

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§ 2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

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§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

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§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.

(b) The claimant, however, may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this subsection shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the

federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

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63 Stat. 62 (April 25, 1949)
(81st Cong. 1st Sess.)

AN ACT

To amend title 28 of the United States Code to provide additional time for bringing suit against the United States in the case of certain tort claims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the first sentence of section 2401 (b) of title 28 of the United States Code is hereby amended to read as follows: "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later."

SEC. 2. (a) Section 1346 (b) of title 28 of the United States Code is hereby amended to read as follows:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

(b) The first paragraph of section 2672 of title 28 of the United States Code is hereby amended to read as follows:

"The head of each Federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Approved April 25, 1949.

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63 Stat. 107 (May 24, 1949) (81st Cong. 1st Sess.)

SEC. 126. The second sentence of subsection (b) of section 2675 of title 28. United States Code, is amended by striking out the word "sub-section" appearing therein and inserting in lieu thereof the word "section".

Pub. L. 86-238, 73 Stat. 472 (Sept. 8, 1959)

* * *

(2) The analysis of chapter 171 is amended by striking out the following item:

"2672. Administrative adjustment of claims of $1,000 or less."

and by inserting the following item in place thereof:

"2672. Administrative adjustment of claims of $2,500 or less."

(3) Subsection (b) of section 2401 of title 28, United States Code, is amended by striking out "$1,000" wherever it appears in such subsection, and by inserting in lieu thereof "$2,500".

Approved September 8, 1959.

Pub. L. 89-506, 80 Stat. 306 (July 18, 1966)

AN ACT

To amend the Federal Tort Claims Act to authorize increased agency consideration of tort claims against the Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, (a) That the first paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

"The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided.* That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee."

(b) The second paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

"Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be

final and conclusive on all officers of the Government, except when procured by means of fraud."

(c) The third paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

"Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromise, or settlements under this chapter."

SEC. 2. (a) Subsection (a) of section 2675 of title 28, United States Code, is amended to read as follows:

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final

denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim."

(b) Subsection (b) of section 2675 of title 28. United States Code, is amended by deleting the first sentence thereof.

SEC. 3. Section 2677 of title 28, United States Code, is amended to read as follows:

"The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon."

SEC. 4. The first paragraph of section 2678 of title 28, United States Code, is amended to read as follows:

"No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title."

SEC. 5. (a) Subsection (b) of section 2679 of title 28, United States Code, is amended to read as follows:

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office

or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

(b) Subsection (a) of section 4116 of title 38, United States Code, is amended to read as follows:

"(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death allegedly arising from malpractice or negligence of a physician, dentist, nurse, pharmacist, or paramedical (for example, medical and dental technicians, nursing assistants, and therapists) or other supporting personnel in furnishing medical care or treatment while in the exercise of his duties in or for the Department of Medicine and Surgery shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or his estate) whose act or omission gave rise to such claim."

SEC. 6. Section 1302 of the Act of July 27, 1956, as amended (70 Stat. 694, 75 Stat. 416; 31 U.S.C. 724a), is further amended (1) by inserting a comma and the word "awards," after the word "judgments" and before the word "and"; (2) by deleting the word "or" after the number "2414" and inserting in lieu thereof a comma; and (3) by inserting after the number "2517" the phrase ",2672, or 2677".

SEC. 7. Subsection (b) of section 2401 of title 28, United States Code, is amended to read as follows:

"(b) a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

SEC. 8. The first sentence of section 2671 of title 28, United States Code, is amended to read as follows: "As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States."

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28 U.S.C. Section 2675 (1992 pocket part, U.S.C.A.)

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

(As amended July 18, 1966, Pub.L. 89-506, § 2, 80 Stat. 306.)

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28 U.S.C. Section 2675 (U.S.C.A. 1965)

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States which has been presented to a federal agency, for money damages for injury or loss of

property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his authority, unless such federal agency has made final disposition of the claim.

(b) The claimant, however, may, upon fifteen days written notice, withdraw such claim from consideration of the federal agency and commence action thereon. Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages. June 25, 1948, c. 646, 62 Stat. 983; May 24, 1949, c. 139, § 126, 63 Stat. 107.

SWDA (RCRA), 42 U.S.C. § 6972(b)

* * *

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section –

(A) prior to 60 days after the plaintiff has given notice of the violation to –

(i) the Administrator;
(ii) the State in which the alleged violation occurs; and
(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to –

(i) the Administrator;
(ii) the State in which the alleged endangerment may occur;
(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment –

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 US.C.A. § 9606].

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response. Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A § 9601 et seq.]; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 [42 U.S.C.A. § 9606] or section 6973 of this title pursuant to which a responsible party is diligently conducting a

removal action. Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

Supreme Court, U.S.
FILED
MAR 31 1993
OFFICE OF THE CLERK

No. 92-6033

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM MCNEIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 28 U.S.C. 2675(a), which provides that "[a]n action shall not be instituted upon a claim against the United States" under the Federal Tort Claims Act "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing," requires a district court to dismiss a complaint filed prior to the agency's denial of the plaintiff's administrative claim, or whether the court has discretion to exercise jurisdiction over the action if the agency denies the claim prior to substantial proceedings on the merits.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 26-31) is reported at 964 F.2d 647. The opinion of the district court (J.A. 18-24) is unreported.

JURISDICTION

The judgment of the court of appeals (J.A. 32) was entered on May 20, 1992. A petition for rehearing was denied on June 26, 1992. J.A. 31. The petition for a writ of certiorari was filed on September 21, 1992, and was granted on January 15, 1993. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2401, 2671-2680, are reprinted in the Appendix to this brief.

STATEMENT

1. a. Petitioner is incarcerated in an Illinois state prison. On March 6, 1989, he filed a *pro se* complaint in the United States District Court for the Northern District of Illinois seeking $20 million in damages against the United States Public Health Service (USPHS) under the Federal Tort Claims Act. J.A. 3-7. Petitioner claimed that he and other inmates had been compelled to participate in experiments conducted or financed by the USPHS for the purpose of studying the spread of infectious diseases. J.A. 3-4. The complaint alleged that petitioner was forced to share a cell with a prisoner who had AIDS, and that the medical experiments had impaired his life in other unspecified respects. J.A. 7.

Petitioner did not present an administrative claim to the agency prior to filing suit in the district court.[1]

[1] Petitioner had previously written a letter to the USPHS seeking information about public health experiments conducted on inmates and requesting damages. On January 24, 1989, the FDA advised petitioner that his letter was being referred to the USPHS claims officer and would be treated as an administrative claim. J.A. 17. Instead, petitioner's inquiry was treated as a Freedom of Information Act request, and he was advised by letter of February 9, 1989, that no responsive documents had been found. J.A. 8-9. Petitioner did not argue in the court of appeals, or in this Court, that his letter to the USPHS should have been treated as an administrative claim, or that the agency's responsive letters constituted a final written denial of that claim.

Instead, on July 7, 1989, approximately four months after the complaint was filed, petitioner submitted a claim to the Department of Health and Human Services (HHS) seeking $500,000 in damages. HHS denied that claim on July 21, 1989. J.A. 12-13. On August 7, 1989, petitioner sent a letter to the district court informing the court that his claim had been denied by the USPHS, and requesting the court to "commence his legal action." J.A. 10.

b. The United States was not served with petitioner's complaint until July 30, 1990, almost 18 months after the complaint was filed, and one year after the administrative claim had been denied. J.A. 2. This delay occurred because petitioner sought leave to proceed *in forma pauperis*, but his motion was not finally acted on by the court until April 20, 1990 (five days after he had voluntarily paid the filing fee). J.A. 1, 20. By order of April 20, 1990, the court denied the motion for leave to proceed *in forma pauperis* as moot, but directed the United States Marshal to serve the complaint because petitioner was incarcerated. J.A. 1. The United States filed an answer on August 29, 1990. J.A. 2. At that time, the United States was unaware that petitioner's complaint had been filed almost a year and a half earlier.

On September 19, 1990, the United States moved to dismiss the complaint. J.A. 2. The motion contended that petitioner's action was barred by the statute of limitations, 28 U.S.C. 2401, because the complaint was not filed until May 25, 1990 (the date the clerk issued the summons), more than six months after his claim had been denied by the agency. J.A. 20. Petitioner opposed the motion to dismiss on the ground that the complaint had been filed with the

clerk on March 6, 1989, prior to the expiration of the six-month period of limitations. *Ibid.* In its reply, the government contended that the action would have to be dismissed under 28 U.S.C. 2675(a) even if petitioner's complaint was filed on March 6, 1989, because that provision prohibits a claimant from instituting an action prior to seeking administrative relief. *Ibid.*

c. The district court dismissed the action. J.A. 18-24. The court first determined that the action was commenced on March 6, 1989, the date petitioner lodged his complaint with the district court and requested waiver of the filing fee. J.A. 20-21. Based upon that determination, the court concluded that it had to dismiss the action because petitioner had not complied with the jurisdictional prerequisites established by Section 2675(a). J.A. 21-24. The court found that petitioner filed the action prior to submitting a claim to the agency (J.A. 23-24), in direct contravention of the statutory requirement that "[a]n action shall not be instituted * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing." 28 U.S.C. 2675(a).

The court rejected the argument that it had discretion to exercise jurisdiction over the case because petitioner had "exhausted his administrative remedies by the time the government filed its motion to dismiss." J.A. 21, 23. Even though the court assumed that dismissal of the complaint would leave petitioner "without any means to pursue his claim against the government" (J.A. 23-24) because more than six months had passed since the denial of his administrative claim, the court found that it had no

authority to "overlook the effect of his premature filing." J.A. 24.[2]

2. a. The court of appeals affirmed. J.A. 26-31. The court concluded that under the terms of 28 U.S.C. 2401(b) and 2675(a), petitioner was required to file his FTCA action between July 21, 1989, and January 21, 1990—the six-month period following the final administrative denial of his claim. J.A. 27. Petitioner did not satisfy this requirement, because the March 1989 complaint was filed "too early," and petitioner did not file a "fresh suit" after July 21, 1989. J.A. 29.

The court of appeals rejected the argument that petitioner's August 1989 letter supplied a basis for jurisdiction. J.A. 29-30. That letter notified the district court that the agency had denied petitioner's administrative claim, and requested the court to "commence his legal action." J.A. 10. The court found, however, that only a new complaint could satisfy the requirement of Section 2675(a). J.A. 29. Because petitioner "did not characterize the letter as a complaint in the district court (where he represented himself) or here (where a professor of the Loyola School of Law is serving as his counsel)," the court found that "it was not plain error" to "treat [the letter] as what it purported to be—a request to

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[2] Section 2401(b) states that a tort action against the United States must be "begun within six months after the date of mailing * * * of notice of final denial of the claim by the agency to which it was presented." Petitioner therefore had six months from July 21, 1989, the date that USPHS denied his administrative claim, within which to file an FTCA action. Petitioner has not filed any action other than the one filed on March 6, 1989.

get on with a pending case, rather than a new complaint." J.A. 30.

b. In reaching its decision, the court declined to follow the rule established in two other circuits that when "the administrative claim is denied before any substantial progress has been made in the pending litigation, the suit need not be refiled to be effective." J.A. 27 (quoting *Kubrick* v. *United States*, 581 F.2d 1092, 1098 (3d Cir. 1978), rev'd on other grounds, 444 U.S. 111 (1979), and citing *Celestine* v. *Veterans Admin. Hosp.*, 746 F.2d 1360, 1363 (8th Cir. 1984)). The court found that neither of those decisions "discussed the language of § 2675(a)" or "explain[ed] why the statute Congress actually enacted may be disregarded." J.A. 28. The court instead agreed with the Fifth Circuit's decision in *Reynolds* v. *United States*, 748 F.2d 291, 292 (1984), which the district court had relied upon in support of its dismissal of petitioner's action. J.A. 27-29. See also *Jerves* v. *United States*, 966 F.2d 517 (9th Cir. 1992) (construing Section 2675(a) as barring an action filed before the plaintiff filed an administrative claim and received a final denial).

The court of appeals drew support for its reading of Section 2675(a) from this Court's decision in *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989). In that case, the Court interpreted a section of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6972(b)(1), which required parties to give state and federal authorities 60 days' notice prior to commencing an action under the Act. In *Hallstrom*, the Court rejected the argument that this requirement could be satisfied by filing the action before giving the agencies 60 days' notice as long as the action was stayed for 60 days thereafter. 493

U.S. at 26. In this case, the court of appeals compared the FTCA to the RCRA, and determined that "Section 2675(a) is no less insistent that '[a]n action shall not be *instituted*' before the administrative action" (J.A. 28); that *Hallstrom*'s observation that "negotiation may be more effective if there is not already a lawsuit on file" is "no less true of the FTCA than of the RCRA" (J.A. 29); and that Section 2675(a), which represents a "condition on access to the Treasury" is a more appropriate candidate for "literal interpretation" than "fetters on litigation against persons despoiling the environment." J.A. 29. The court of appeals accordingly concluded that "*Hallstrom* ordains the interpretation of § 2675(a)." *Ibid.*

c. Judge Ripple dissented. J.A. 30-31. He found that it was unnecessary to define the scope of the district court's discretion under Section 2675(a). In his view, petitioner's August 7, 1989, letter "serves as an adequate complaint" and constituted an "attempt[] to refile the action." J.A. 31.[3]

[3] The petition filed in this action did not seek review of the question decided by Judge Ripple. See Pet. at Question Presented ("Whether an incomplete filing" in an FTCA action "may be perfected by filing a notice of final agency denial of the claim prior to substantial progress on the merits?"). Petitioner's brief adds a second question, however. Pet. Br. i. That question purports to include the issue of whether the action is barred if the plaintiff requests the court to "commence his legal action" when he files proof of the agency's denial of the claim. *Ibid.* Although we share the court of appeals' view that petitioner did not preserve the argument that his letter could be characterized as a supplemental pleading, J.A. 30, we do not object to consideration of this issue. For the reasons set forth at note 4, *infra*, we do not think the language of petitioner's letter alters the outcome in this case.

SUMMARY OF ARGUMENT

Petitioner filed an FTCA action against the United States without first complying with an administrative claim procedure established by Congress. Section 2675(a) of the FTCA mandates that a tort action "shall not be instituted" against the United States unless two prerequisites have been satisfied: "the claimant shall have *first* presented the claim" to the agency, and the claim "shall have been finally denied by the agency in writing." 28 U.S.C. 2675(a) (emphasis added). Petitioner had satisfied neither condition at the time he filed his complaint. Petitioner contends that dismissal of his complaint was not required because he cured the jurisdictional defect by exhausting the statutory claim procedure several months after the claim was filed. The lower courts correctly determined that the language of the FTCA precludes courts from creating implied exceptions to the unambiguous requirements of Section 2675(a), and that any such interpretation would also be foreclosed by this Court's decision in *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989).

A. Section 2675 obviously does not confer express authority on federal courts to excuse literal compliance with its terms. Nor can that authority be implied. First, Section 2675 is written as a mandatory prohibition on filing suit unless the plaintiff "first" presents the claim to the agency. Second, Congress created certain limited exceptions to the bar established by Section 2675(a), but those exceptions do not make any allowance for litigants who exhaust the claim procedure after filing the action. Third, 28 U.S.C. 2679(d)(5) demonstrates that Congress presumed that actions filed against federal officials

would have to be dismissed for nonconformance with the terms of Section 2675(a) if the United States is later substituted as the defendant under the Westfall Act. To alleviate the unfairness of that result, Congress modified the statute of limitations, but did not create an exception to Section 2675 so as to permit exhaustion while the civil action remained pending. Finally, the grant of jurisdiction to entertain tort actions against the United States is expressly made "subject to the provisions of [the FTCA]," 28 U.S.C. 1346(b), and jurisdictional requirements must be strictly observed.

B. The court of appeals also correctly determined that this Court's decision in *Hallstrom* "ordains [this] interpretation of Section 2675(a)." J.A. 29. In *Hallstrom*, the Court concluded that it had no discretion to affirm a judgment entered after four years of litigation and a trial on the merits. The Court ordered dismissal of the action because the plaintiffs filed their complaint without giving state and federal agencies 60 days' advance notice as required by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6972(b)(1).

This Court determined that when Congress provided that "no action may be commenced" prior to giving notice, federal courts are "not at liberty to create an exception." 493 U.S. at 27. Even though a 60-day stay of the action may have served as the "functional equivalent" of the statutory requirement, the Court concluded that it would not "honor" the statutory prohibition against filing the action in the first place. *Id.* at 26. Here, petitioner did not "honor" the requirements of Section 2675 when he filed his action first and his administrative claim later.

ARGUMENT

PETITIONER FAILED TO MEET THE PREREQUISITES FOR SUIT SET FORTH IN SECTION 2675(a), AND THE DISTRICT COURT WAS THEREFORE REQUIRED TO DISMISS HIS COMPLAINT

Congress vested district courts with jurisdiction over tort actions against the United States pursuant to 28 U.S.C. 1346(b), but expressly provided that this grant of jurisdiction was "[s]ubject to the provisions of chapter 171 of [the FTCA]." *Ibid.* One of those provisions, 28 U.S.C. 2675(a), explicitly prohibits the institution of a tort action against the United States "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing." There is no dispute that petitioner had not complied with this requirement when he filed his action in March of 1989. Petitioner nevertheless contends that Congress did not require dismissal of all actions that failed to meet the prerequisites of Section 2675(a), but instead gave district courts discretion to proceed with such an action once the agency denied the administrative claim. The court of appeals correctly determined that petitioner's claim is foreclosed by the language of the FTCA and this Court's decision in *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989). Dismissal of the action was required.

A. The Language Of The FTCA Establishes That A District Court Does Not Have Discretion To Exercise Jurisdiction Over An FTCA Action Filed Prior To The Plaintiff's Submission Of An Administrative Claim

In cases that turn on statutory construction, "the beginning point [for analysis] must be the language

of the statute," and when a statute's language is plain, "judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). Here, the express terms of Section 2675(a), the language of Section 2679, and the canons of construction that govern the interpretation of the FTCA, establish that the district court did not have discretion to proceed with this civil action.

1. As the court of appeals found, Section 2675(a) is written as an express *prohibition* on suit. J.A. 28. It commands that "an action shall not be instituted" unless its prerequisites are met. 28 U.S.C. 2675(a). Where Congress has expressly forbidden the institution of an action unless certain conditions are met, there is no basis for concluding that a district court has implied discretion to entertain such an action anyway. *Hallstrom*, 493 U.S. at 26, 31.

In addition, Congress created certain limited exceptions to the bar established by Section 2675(a), and those exceptions do not make any allowance for the circumstances of this case. The last sentence of Section 2675(a) states that "[t]he provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim." All of the pleadings referenced are defensive in character, suggesting that Congress did not seek to impose the mandatory exhaustion requirement on litigants who have not initiated the action in the first instance.

Congress made no exception, however, for a plaintiff who might seek to amend or supplement his complaint in some fashion to assert compliance with

the exhaustion requirements after initiation of the action. Any such "exception" would obviously vitiate the rule that the claimant must "first" submit the administrative claim.[4] Congress enacted Section 2675 to give federal agencies an opportunity to settle each claim *prior* to the filing of litigation. If petitioner's rule were to prevail, plaintiffs could completely ignore that statutory requirement.

2. This interpretation of Section 2675(a) is further confirmed by the text of 28 U.S.C. 2679. Section 2679 governs tort actions filed against federal officials. The statute provides that the United States must be substituted as the defendant in such actions if the Attorney General, or the court, certifies that the defendant/employee committed the allegedly tortious acts within the scope of his employment. 28 U.S.C. 2679(d)(1) and (3). Section 2679(d)(5) was enacted, however, on the premise that Section 2675(a) requires dismissal of such actions where the plaintiff has not submitted an administrative claim to the agency prior to filing suit. Congress itself has therefore determined that courts do not have equita-

[4] For this reason, we do not believe that petitioner could prevail even if his August 1989 letter were characterized as an amended or supplemental pleading under Fed. R. Civ. P. 15. See Pet. Br. 47-48. Rule 15 permits supplemental pleadings in an ongoing civil action. Section 2675, however, prohibits institution of that very "action," so the jurisdictional defect cannot be cured by filing additional pleadings in the forbidden suit. As the court of appeals concluded, only a new civil action can satisfy the command of Section 2675. J.A. 29. Even now, petitioner does not contend that his letter can be characterized as the initiation of a new civil action. See Pet. Br. 47-48. As the court of appeals noted, the letter only purported to be "a request to get on with a pending case." J.A. 30.

ble discretion to modify the requirements of Section 2675(a), even where the plaintiff did not voluntarily file the action against the United States.

Once the United States is substituted as the defendant under Section 2679, the action "shall be subject to the limitations and exceptions" applicable to all FTCA actions. 28 U.S.C. 2679(d)(4). Congress further provided that when such an action is then "*dismissed* for failure first to present a claim pursuant to section 2675(a) of this title," the statute of limitations set forth in Section 2401(b) is modified so that the claim can be presented to the agency "within 60 days after *dismissal* of the civil action." 28 U.S.C. 2679(d)(5)[5] (emphasis added). It is significant that Congress did not provide that such plaintiffs could comply with the exhaustion requirements of Section 2675 during the pendency of the action, even though their failure to submit a prior administrative claim might readily be explained by the fact that they were not asserting a claim against the United States at the time they filed the action. Congress instead accommodated their circumstances by extending the statute of limitations for filing a new action, not by excusing or modifying the prerequisites established by Section 2675(a). It would therefore be particularly inappropriate to conclude that a plaintiff who files an action against the United States in the first instance can nevertheless avoid dismissal under Section 2675 by exhausting his administrative claim during the pendency of the civil action.

[5] Under the terms of 28 U.S.C. 2401(b), the claimant would then have six months from the date of "final denial of the claim by the agency" to file a new civil action on the claim.

3. Contrary to the contention of petitioner and his *amicus*, the construction we urge is neither unduly strict nor "hypertechnical." See Pet. Br. 27; Trial Lawyers For Public Justice *Amicus* Br. 3-4. Rather, the interpretation we urge is the one required by the statute's language. And that interpretation is further confirmed by the governing principles of statutory construction.

a. As the court of appeals found, Section 2675(a) is a "prime candidate for literal interpretation" because it is a "condition on access to the Treasury." J.A. 29.[6] This Court has repeatedly recognized that the FTCA "waives the immunity of the United States," and in light of that fact, has emphasized that it is not free "to extend the waiver beyond that which Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). See *Smith* v. *United States*, No. 91-1538 (Mar. 8, 1993), slip op. 6-7; *Dalehite* v. *United States*, 346 U.S. 15, 31 (1953) (this Court's "decisions have interpreted the Act to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions"). See also

[6] Petitioner notes (Pet. Br. 32-37) that Section 2675 was modeled on the notice requirements of state statutes governing suits against municipalities; and that, because those notice provisions were enacted in derogation of the common law, they have been strictly construed against municipalties. That rule of construction would surely not be applicable to Section 2675, however. As a general matter, the common law background applicable in this context is that the United States was altogether immune from suit. See *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Further, Congress did not simply codify municipal notice requirements into federal law. This Court must obviously construe the language actually chosen by Congress, and give that language effect.

United States v. *Sherwood*, 312 U.S. 584, 586 (1941).[7]

b. In addition, the requirements of Section 2675(a) represent conditions on the jurisdiction of the federal courts.[8] See 28 U.S.C. 1346(b) (creating jurisdiction "[s]ubject to the provisions of [the FTCA]"). Many lower courts have concluded that "[t]he requirements [of Section 2675] are jurisdictional and cannot be waived." *Cizek* v. *United States*, 953 F.2d 1232, 1233 (10th Cir. 1992). Accord, *e.g.*, *Corte-Real* v. *United States*, 949 F.2d 484, 485-486 (1st Cir. 1991); *Meridian Int'l Logistics, Inc.* v. *United States*, 939 F.2d 740, 743 (9th Cir. 1991); *Adkins* v. *United States*, 896 F.2d 1324, 1326 (11th Cir. 1990); *McAfee* v. *5th Circuit Judges*, 884 F.2d 221, 222-223 (5th Cir. 1989); *Bradley* v. *United*

[7] This is not a case in which an *exception* to the FTCA's waiver of immunity is at issue; to the contrary, Section 2675 sets express *conditions* on the waiver. It would therefore be inappropriate to apply the principle that exceptions to the FTCA's waiver of immunity must be "narrowly construed," as this Court has sometimes done. See *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1014 (1992) (citing *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951)). See also *Smith* v. *United States*, No. 91-1538 (Mar. 8, 1993), slip op. 6 (Stevens, J., dissenting).

[8] Because the "general rule" is that "if an action is barred by the terms of a statute, it must be dismissed," *Hallstrom*, 493 U.S. at 31, this Court need not reach the question whether Section 2675(a)'s requirements are jurisdictional in order to resolve this case. If the Court agrees that the language of the statute is plain, it follows that "a district court may not disregard [its] requirements at its discretion." *Ibid.* Accordingly, just as the Court concluded in *Hallstrom*, dismissal would be required even if Section 2675(a) were not "jurisdictional in the strict sense of the term." *Ibid.*

States, 856 F.2d 575, 578 (3d Cir. 1988); *Knapp* v. *United States*, 844 F.2d 376, 378 (6th Cir. 1988). And the provisions of Section 2675 were recently described as "jurisdictional" in the legislative history of the Westfall Act amendments to the FTCA. H.R. Rep. No. 700, 100th Cong., 2d Sess. 8 n.3 (1988).

Given the jurisdictional character of Section 2675, it would be particularly inappropriate to permit federal courts to recognize implied exceptions to the literal terms of that Section.[9] This Court should accordingly conclude that the specific language of the FTCA requires dismissal of any action filed in violation of the jurisdictional conditions established by Section 2675, without regard to the plaintiff's subsequent efforts to present an administrative claim to the agency.[10]

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[9] This Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), does not point to a different conclusion. The Court determined in *Irwin* that the statute of limitations applicable to suits against the United States under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, was subject to equitable tolling. This Court has not determined whether tolling is available under the FTCA statute of limitations, 28 U.S.C. 2401, but *Irwin* has no bearing on the proper interpretation of Section 2675 in any event. Section 2675 does not establish periods of limitation—it establishes mandatory exhaustion prerequisites. The Court noted in *Irwin* that statutes of limitations are generally subject to equitable tolling, but outside that context, this Court has steadfastly adhered to "the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarge[d] * * * beyond what the language requires." *United States* v. *Nordic Village, Inc.*, 112 S. Ct. at 1014-1015 (internal quotations and citations omitted).

[10] This Court has allowed a plaintiff to cure a jurisdictional defect where the language of the governing statute permitted

B. *Hallstrom* v. *Tillamook County* Controls This Case

1. As the court of appeals found, this Court's decision in *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989), is analytically indistinguishable from this case. *Hallstrom* involved the interpretation of a notice requirement in the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6972(b)(1). That statute provided that "[n]o action may be commenced * * * prior to 60 days after the plaintiff has given notice of the violation" to state and federal authorities. The plaintiffs in *Hallstrom* filed suit in the district court before notifying the appropriate administrative agencies in accordance with the requirements of the statute. Notice was subsequently given, and the action was stayed for 60 days. After nearly four years of litigation, including a trial on the merits and a liability finding in favor of the plaintiffs, the case reached this Court.

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that result. In *Mathews* v. *Diaz*, 426 U.S. 67, 75 (1976), a plaintiff sought to challenge the agency's policy of denying Social Security benefits to a certain class of aliens. The plaintiff did not file an application for those benefits until after the action was filed, but the Court concluded that jurisdiction was proper because the complaint could have been supplemented to allege the fact that the agency had issued a final decision on the application. *Id.* at 75 & n.9. The statute at issue in *Diaz*, 42 U.S.C. 405(g), however, provides only that an individual "may obtain" review of a "final decision of the Secretary." That section does not contain any language similar to that of Section 2675 *prohibiting* a claimant from filing a civil action prior to the agency's denial of an administrative claim. By way of contrast, this Court squarely rejected the contention that RCRA's 60-day notice provisions could be satisfied during the pendency of the action because the language of the Act *prohibited* such action. *Hallstrom*, 493 U.S. at 26.

This Court held that the notice provision was "a specific limitation on a citizen's right to bring suit" and that it set a "mandatory * * * condition precedent for suit." 493 U.S. at 26. The plaintiffs' failure to issue the required notices prior to filing suit mandated dismissal of the complaint. The Court rejected policy arguments similar to those petitioner makes here: that the plain terms of the statute should not be enforced so long as the substance of the notice requirement was met, see *id.* at 28; and that it would be wasteful and inefficient to require dismissal of the action. See *id.* at 32. The Court declared that "we are not at liberty to create an exception where Congress has declined to do so," *id.* at 27, even in a case where litigation "consumed the time and energy of a District Court and the parties for nearly four years." *Id.* at 32.

Petitioner suggests three bases for distinction between *Hallstrom* and this case: the language of the two statutes; the purposes underlying the statutory schemes; and the nature of the prejudice that would result if equitable exceptions are not recognized. An examination of these issues, however, simply confirms the correctness of the court of appeals' conclusion that *Hallstrom* "ordains" our interpretation of Section 2675(a). J.A. 29.

2. Petitioner argues (Br. 41-43) that the result in *Hallstrom* should not govern here because the FTCA provides that an action "shall not be instituted" prior to filing an administrative claim, whereas RCRA provides that an action "may [not] be commenced" until the required notice is given. Petitioner argues that the word "institute" may include activities before or after an event "commences." Thus, petitioner argues that although his action

"commenced" on March 6, 1989, it was not "instituted" until his administrative claim was denied five months later.

Petitioner's effort is unavailing. The terms "institute" and "commence" are synonymous. The dictionary defines "institute" as "to originate and get established" or to "cause to come into existence," and offers as synonyms "inaugurate" or "initiate." *Webster's Third New International Dictionary* 1171 (1986). Giving the term its ordinary meaning, there can be no doubt that petitioner's action was "originated," and "came into existence"—that is, it was instituted—when he filed his complaint. See *Smith-Bey* v. *Hospital Adm'r*, 841 F.2d 751, 757 n.5 (7th Cir. 1988) (complaint is deemed filed when it is "placed in the custody of the district court clerk"). Moreover, Congress has frequently used the words "institute" and "commence" interchangeably in referring to the initiation of a civil suit. See, *e.g.*, 16 U.S.C. 544m(b); 7 U.S.C. 2305(a); 12 U.S.C. 1977; 25 U.S.C. 640d-17(c); 19 U.S.C. 1641(d)(4); 42 U.S.C. 2651(b); 19 U.S.C. 1621; 29 U.S.C. 256; 42 U.S.C. 2000a-3(a).

3. a. The purposes underlying the prerequisites for suit under the RCRA and the FTCA are also closely analogous. This Court suggested in *Hallstrom* that Congress may have determined that negotiation would be more effective if plaintiffs were to notify agencies of potential claims before filing environmental lawsuits. 493 U.S. at 29-30. As the court of appeals noted, "that observation is no less true of the FTCA than of the RCRA." J.A. 29.

Congress did not understand the administrative claim requirement in the FTCA to be without sub-

stance or utility.[11] On the contrary, Section 2675(a) represents the balance Congress struck between permitting tort recovery against the United States and preventing excessive numbers of such suits in federal courts. Congress thus required federal agencies to be given the opportunity to settle meritorious claims, with the expectation that doing so would "ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the

[11] As part of the deliberations leading to the enactment of Section 2675, Congress was presented with testimony that claimants regularly bypassed the agencies when the administrative settlement process was optional, as it was with respect to the FTCA. *Hearing on Improvement of Procedures in Claims Settlement and Government Litigation Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 12-14 (1966) (statement of Ass't Att'y Gen. John W. Douglas). In response, Congress enacted Section 2675 to make the administrative filing requirement compulsory, and also removed caps on agency settlement authority. Act of July 18, 1966, Pub. L. No. 89-506, §§ 1(a), 9(a), 80 Stat. 306, 308. Congress expected that making an administrative claim a prerequisite to suit "would not only benefit private litigants, but would also be beneficial to the courts, the agencies, and the Department of Justice itself." S. Rep. No. 1327, 89th Cong., 2d Sess. 6 (1966). See also *Douglas* v. *United States*, 658 F.2d 445, 447 (6th Cir. 1981) ("[t]he compulsory administrative claim procedure in the amended FTCA was established to reduce congestion of federal courts' dockets and to speed fair treatment of those asserting claims against the federal government"). Moreover, it was important to present the claim initially to the concerned agency, because that agency "would have the best information concerning the [event and] is the one directly concerned, it can [therefore] be expected that claims which are found to be meritorious can be settled more quickly without the need for filing suit and possible expensive and time-consuming litigation." S. Rep. No. 1327, *supra*, at 3.

fair settlement of tort claims asserted against the United States." S. Rep. No. 1327, 89th Cong., 2d Sess. 6 (1966).

Requiring presentment of a claim to the agency *prior* to filing suit serves an additional function as well. Just as was the case in *Hallstrom*, Congress concluded that it was important to permit settlement negotiations to proceed without the backdrop of pending litigation. Moreover, claimants are required to disclose the amount of damages they are seeking, and the statute bars any cause of action "for any sum in excess of the amount of the claim presented to the federal agency." 28 U.S.C. 2675(b).[12] Thus, the federal agency is put on notice of the amount of money that is at stake, and if it chooses not to settle, it is shielded from liability for an amount in excess of the plaintiff's administrative claim.[13]

b. Petitioner nevertheless invokes legislative history to support his contention that the FTCA, unlike the RCRA, should be construed to effectuate its goal of compensating persons injured by reason of the government's tortious acts. See Pet. Br. 10-32. The history of Section 2675(a), however, indicates that Congress did not expect courts to disregard statutory prerequisites to suit. As set forth, Congress in fact recently characterized the requirements of Section

[12] The statute permits, however, claims in excess of the amount sought administratively if "the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency." 28 U.S.C. 2675(b).

[13] We note that in this case petitioner's complaint sought $20 million in damages, while his later-filed administrative claim only sought $500,000.

2675(a) as "jurisdictional." H.R. Rep. No. 700, 100th Cong., 2d Sess. 8 n.3 (1988).

The history of the FTCA demonstrates that Congress initially did not consider it necessary to require plaintiffs to seek administrative relief at any time, either before or after filing suit in district court.[14] Dissatisfied with that regime, Congress enacted Section 2675(a), which by its clear terms *requires* the presentment of an administrative claim *prior* to filing suit. In view of the congressional rejection of its former rule permitting administrative claims to be made (and withdrawn) at the plaintiff's option, it would be particularly inappropriate to disregard Section 2675(a)'s absolute requirement that an administrative claim be presented prior to filing suit.

c. Petitioner further argues that the purposes of the FTCA are satisfied if an administrative claim is filed and denied at some point prior to dismissal of the action. But the same argument was rejected in *Hallstrom*. This Court found that even if the entry of a 60-day stay in a RCRA action were the "functional equivalent" of a pre-filing notice requirement, the entry of a stay simply did not "honor" the statutory "prohibition" against filing suit. 493 U.S. at

[14] From 1946, when the FTCA was first enacted, until 1966, plaintiffs had the option of filing an administrative claim before filing an action in federal court. There was no requirement that they do so. Further, if a person chose to file an administrative claim, he was entitled, on 15 days' notice, to withdraw his claim from agency consideration and institute suit. See Federal Tort Claims Act of 1946, ch. 753, § 410, 60 Stat. 843. Even where claims were filed, agency settlement authorization was limited to claims not exceeding $1000, § 403(a), 60 Stat. 843, an amount raised to $2500 in 1959. Act of Sept. 8, 1959, Pub. L. No. 86-238, 73 Stat. 472 (codified at 28 U.S.C. 2672).

26. Similarly, even if petitioner's notice to the court that the agency had denied the claim (whether that notice took the form of a letter or an amended complaint) could be characterized as the "functional equivalent" of a new action, such a notice does not "honor" the statutory prohibition against filing the action in the first place. *Ibid.*

4. a. There is also no basis for distinguishing *Hallstrom* on equitable grounds. Petitioner relies (Pet. Br. 40) on this Court's statement in *Hallstrom* that dismissal of the RCRA action would not deprive the plaintiffs of their "right to a day in court" because they would "remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards." 493 U.S. at 32. In contrast, petitioner claims that he "is long out of time to refile his case" because his complaint was "lost in the mass of prisoner litigation." Pet. Br. 40 (quoting J.A. 20). Although it may be true that the plaintiffs in *Hallstrom* could refile their action because they were challenging continuing environmental violations, and that petitioner's action may now be barred by the FTCA's statute of limitations, that difference is not germane to the issue of statutory interpretation before the Court.

First, there was no dispute that dismissal of the action in *Hallstrom* substantially prejudiced the plaintiffs. The parties had prevailed at trial after almost four years of litigation. 493 U.S. at 32. Dismissal of the action required them to start anew. The Court did not, however, consider itself at liberty to affirm the judgment in the plaintiffs' favor because the notice provision represented a "specific limitation" on the "right to bring suit" that was not subject to a "flexible or pragmatic construction." *Id.* at 26. As

in *Hallstrom*, a district court hearing an FTCA action "may not disregard these requirements at its discretion." *Id.* at 31.

Second, the Court did not suggest that it would have interpreted the statute to grant such discretion if dismissal would have caused the plaintiffs to forfeit their "right to a day in court." 493 U.S. at 32. The Court cited this factor only in connection with the determination that its decision could properly be applied retroactively. *Ibid.* Other factors cited by the Court would similarly support retroactive application of the rule adopted by the court of appeals in this case.[15]

Third, petitioner is prejudiced only if his claim would now be barred by the statute of limitations. That issue has never been decided, however, because petitioner never sought to file a new civil action after his administrative claim was denied.[16] Petitioner has never argued that the FTCA's statute of limitations is subject to equitable tolling, or that the statute of

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[15] As the court of appeals noted (J.A. 30), the agency unequivocally informed petitioner when it denied his claim that he had six months in which to "file suit against the United States." J.A. 13. Petitioner did not file a complaint within that time period, and has not done so to this day. Moreover, as in *Hallstrom*, the statute itself put petitioner on notice of what was required. Petitioner has not, in any event, contended that this Court's decision should only apply prospectively.

[16] Although petitioner now suggests that his August 1989 letter could be treated as an amended or supplemental pleading in his 1988 action, Pet. Br. 47-48, he has never contended that he in fact intended to initiate a new civil action. As set forth, that is what the statute requires, because the "action" itself was barred. 28 U.S.C. 2675(a).

limitations set forth in 28 U.S.C. 2401 should be tolled under the circumstances of this case. But if petitioner is to be afforded any equitable relief, it is certainly more appropriate that it be granted under Section 2401 than under Section 2675. The unfairness that petitioner alleges does not stem from enforcement of the clear requirements of Section 2675, but from the fact that the district court did not dismiss his complaint until it was too late to file another action under Section 2401(b).

In any event, the structure of the statute indicates that exceptions to Section 2401's statute of limitations are quite limited. As set forth, Congress has modified the time limits established by Section 2401 to relieve certain plaintiffs from the consequences of a procedural default under Section 2675. But Congress has made no exceptions to the requirements of Section 2675, other than for parties asserting defensive tort claims. See 28 U.S.C. 2675(a) (excepting third party complaints, cross-claims, and counterclaims). Thus, as in *Hallstrom*, this Court should conclude that Section 2675 "contains no exception applicable to petitioners' situation" and federal courts "are not at liberty to create an exception where Congress has declined to do so." 493 U.S. at 27.

b. As with all procedural limitations, adherence to the terms of Section 2675(a) may sometimes make it "impossible to enforce what were otherwise perfectly valid claims." *United States* v. *Kubrick*, 444 U.S. at 125. The clear line drawn by Congress nonetheless ought to be maintained. As this Court has repeatedly stated, "[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Hallstrom*, 493

U.S. at 31 (quoting *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980)).[17]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1993

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[17] Petitioner and his *amicus* argue (Pet. Br. 49; Trial Lawyers for Public Justice *Amicus* Br. 14-15) that his *pro se* status in the district court justifies disregarding Section 2675's procedural requirements. This Court has previously rejected similar contentions. See *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147 (1984); *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980). Moreover, the principle that *pro se* pleadings are to be liberally construed does not help petitioner. No amount of liberal construction can change the fact that his complaint was filed at a time forbidden by Congress.

APPENDIX

The relevant provisions of the Federal Tort Claims Act, 28 U.S.C. 1346, 2401, 2671-2680, provide:

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS §§ 607(g)(1), 609(a)(1)]. For the purpose of this paragraph,

an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in

the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §§ 6226, 6228(a), 7426, 7428, 7429].

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [28 USCS § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

§ 2671. Definitions

As used in this chapter [28 USCS §§ 2671 et seq.] and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the

United States, and corporations primarily acting as instrumentalties or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior

written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5 [5 USCS §§ 581 et seq.], to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and com-

promises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter [28 USCS §§2671 et seq.].

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively,

for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter [28 USCS §§ 2671 et seq.], the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or lgislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter [28 USCS §§ 2671 et seq.]

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within

six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

§ 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

§ 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

§ 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346 (b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by section 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any

other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time

of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions

of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346 (b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

§ 2680. Exceptions

The provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60224

Supreme Court, U.S.
FILED
APR 8 1993
OFFICE OF THE CLERK

No. 92-6033

In The

Supreme Court of the United States

October Term, 1992

WILLIAM MCNEIL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Whether an incomplete filing of a Federal Tort Claims Act suit may be perfected by filing a notice of final agency denial of the claim prior to substantial progress on the merits?

II. May the United States government bar a Federal Tort Claims Act suit when a *pro se* prisoner files a premature suit, but satisfies the Congressional requirement – that the claim be presented to and denied by the agency before it is heard by the court – by filing a final agency denial of the claim prior to any substantial progress on the merits of the case, and, in so doing, requests the court to "commence his legal action?"

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STATEMENT OF FACTS

The statement of facts by the Acting Solicitor General contains serious inaccuracies.

It is simply not true that "Petitioner did not present an administrative claim to the agency prior to filing suit in the district court." Acting Solicitor General's Brief (hereinafter Sol.Gen.Br.), p.2. Moreover, Mr. McNeil informed both the seventh circuit as well as the district court that he had filed an administrative claim prior to filing suit.[1]

The argument made at page 8 of the Acting Solicitor General's brief is quite incorrect that, "Petitioner has satisfied neither condition [presentation and final denial]. . . . " Presentation certainly took place; the agency knew it had a claim and said so. (Jt. App. 17)

Petitioner did "argue in the court of appeals, [and] in this Court, that his letter to the USPHS should have been treated as an administrative claim." (Sol.Gen.Br., p.2, n.1) *See* Mr. McNeil's Pro Se initial and reply briefs in the court of appeals. (App. A) The initial brief by counsel for

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[1] See Jt. App. 10 re notice in district court. The Acting Solicitor General's brief n.1, p.2 admits that the FDA advised Mr. McNeil that his letter was being sent to a CLAIMS officer. Nowhere in the record is there a statement that Mr. McNeil's claim had been reclassified as a FOIA request in lieu of a claim. In fact, Mr. McNeil had sent the administrative agency another letter, a FOIA request along with his initial claim. (The FOIA letter was filed with his complaint as part of item # 1 in the district court record.)

Mr. McNeil apparently believed he was required to sue within six months of his January 17, 1989 claim. See Pro Se Brief, App. A, "damn if you do and damn if you don't."

Mr. McNeil in the court of appeals also stated that a claim was filed in January, 1989.[2]

Mr. McNeil's pro se reply brief[3] reinforced these same points: he filed his claim with the administrative agency; he thought the claim had been denied; he then filed suit. In response to receiving a form #95, he sent a second claim; it too, was denied. (App. A)

Each of these matters was clearly raised in this court. *See* Pet. Brief p. 2, Pet. for Cert., p. 3. Neither waiver[4] nor any failure to present to this court has occurred.

Moreover, Mr. McNeil paid the filing fee more than a year before the Acting Solicitor General asserts he did (not as an obviously incorrect docket entry indicates, an entry relied upon by the Acting Solicitor General's brief p. 3).[5]

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[2] Initial brief, pp. 3-4. Indeed, note 1, p. 4 makes clear that *two claims had been made*, but stated it was unclear in the record whether the July 21, 1989 denial letter addressed the January 17, 1989 or the July 7, 1989 claim. "What is known with certainty, is that by July 21, 1989 McNeil had gained the right to sue in federal court." It was also suggested that August 7, 1989 was the date of filing a cause of action in federal court which should "act as the date of filing for purpose of determining the limitations period." (p. 7) (See also *Id.* p. 8. note 2.)

[3] This pro se reply brief was itself mislaid (unfortunately an all too common occurrence for Mr. McNeil's court filings) and located only subsequent to the grant of certiorari in this case.

[4] Petitioner's Brief in this court stated, "[H]is suit should proceed either because that [August] filing constituted a new filing, or alternatively, a filing that perfected his original court filing." (p. 7). This contradicts the statement, "[P]etitioner does not contend that his letter can be characterized as the initiation of a new civil action." Sol.Gen.Br. p. 12, n.4.

[5] *See*, Exhibit B to this brief, and Jt. App. 1, docket entry for April 25, 1990 "Copy of receipt for payment of filing fee.

ARGUMENT

Mr. McNeil submitted his claim to the administrative agency as required by law, and multiply exhausted the administrative remedy long before the government has any colorable claim that it had been prejudiced. Every expressed Congressional purpose has been fulfilled, for the agency both considered and rejected his claim.[6]

The Acting Solicitor General's brief ignores the extensive statutory history discussed in Mr. McNeil's brief at pp. 15-32, that gives context to the FTCA as part of a major reform of *Congress*. The *Westfall* amendment is not inconsistent with the arguments advanced in Petitioner's brief, but supports that analysis: the FTCA was a remedial statute intending to replace private bills with judicial remedies that were to be the *same* as those available in suits between private parties. Sovereign immunity was *waived* in 1946. Not a shred of legislative history cited by the Acting Solicitor General suggests any intent to retract that 1946 waiver.[7] Exhaustion can properly be considered

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(Temporarily unavailable for docketing)", and also n. 3, p. 4, Pet. Brief in this court. The district court docket entry suggests the original receipt may never have been located. Moreover, the docket entry is dated incorrectly. The entry date of 4/25/90 purports to reflect a document it states was filed 5/15/90 (twenty days later). The next docket entry reflects the court's order of 4/20/90. Mr. McNeil's rights should not be lost by obvious clerical mistakes.

[6] Alternatively, six months had passed from the first filing, and/or Mr. McNeil had been mislead by the agency communications into filing suit.

[7] *Smith v. United States*, 113 S.Ct. 1178, No. 91-1538 (March 3, 1993) is not to the contrary, for the issue in *Smith* was the scope of an explicit textual refusal to waive in 1946. 28 U.S.C. sec. 2680(k)

a condition precedent to recovery, but not jurisdiction to proceed.

Hallstrom v. Tillamook County, involved dissimilar legislation with quite different legislative reasons for conditioning suit upon prior notice, including most importantly a desire that governmental bodies be primarily responsible for enforcing complex federal environmental statutes. Such a purpose could not be served by notice after filing suit. The Congressional purposes of the FTCA administrative claim requirement, however, can all be served by a rule that permits exhaustion as long as it predates substantial progress.

Federal Rule of Civil Procedure 15(d) provides in any case that Mr. McNeil's August letter properly permitted the litigation to proceed.

I. The *Westfall* Amendment Supports no Narrow Construction of the FTCA, but Instead Supports a Practical Approach

Neither the text of the *Westfall* Amendment[8] nor its legislative discussion refers to *completion* of the agency consideration of a claim. Nothing in the legislative history suggests failure to exhaust prior to filing suit

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See also Rep. Owens' statement two weeks after this court's decision of *Westfall*. "When Congress enacted the FTCA it thought that it was abolishing the sovereign immunity doctrine. . . . " Congressional Record, House, 100th Cong. 2nd Sess. H 28, January 27, 1988.

[8] *Westfall v. Erwin,* 484 U.S. 292 (1988). Pub. L. 100-694. The argument regarding the last sentence of section 2675(a) (Sol.Gen.Br. 11) is not well taken for each of the cases mentioned are by definition already in court, indeed many because the Federal Government initiated suit.

undercuts the validity of a good faith court filing. *See,* Pet. Brief, p. 24, n.22.

The Acting Solicitor General's brief cites a single 1988 reference to legislative history for the proposition that section 2675 is jurisdictional.[9] That citation is misleading for the reference was to "Persons who have initiated a lawsuit but never *submitted an administrative claim to the Government*[10]" (emphasis added). It refers to neither receipt of a sum certain denial letter, nor to 6 months passing. The reference thus has absolutely nothing to do with Mr. McNeil's situation.[11] Indeed, the remainder of the referenced paragraph reiterated Congress's persistent, and oft repeated FTCA purpose, ensuring access to courts for claims against the federal government the *same* as for suits against private defendants.[12]

Moreover, the attempt to analogize between Congress's consideration of the *Westfall* amendment and the

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[9] A brief half line footnote reference. See, House Report 100-700, 100th Cong. 2nd Sess. (June 14, 1988) at p. 8.

[10] Id. The text immediately continues: "will not lose their right to pursue a lawsuit for having failed to submit such a claim. Instead, as long as their suit was timely under state law when it was filed, they will have at least 60 more days to file a timely administrative claim."

[11] Compare, *Knapp v. U.S.,* 844 F.2d 376, 379-80 (6th Cir. 1988) (VA entitled to refuse to negotiate with "improper representative," refusal had no impact on court jurisdiction).

[12] Indeed, the purpose of the Westfall amendment included relief of pressure on Congress, pressure in the form of suits against Congressional employees or officers. See p. 3, H.R. 100-700: *Westfall* affects "officers and employees of all three branches."

deliberate Congressional decision to exempt certain environmental lawsuits from the waiting period is defective, for the two Congressional actions are quite dissimilar.

In the environmental area, Congress expressly considered whether in certain limited cases a private attorney general's suit against an alleged polluter could bypass the 60 day waiting period after notice. Congress decided to permit limited bypasses but in most cases preferred that the private attorney general try to prod the government to pursue enforcement. *See* examples cited at *Hallstrom v. Tillamook County,* 493 U.S. 20, 30 (1989).

The *Westfall* amendment relates to no similar purpose regarding FTCA claims, but relates to cases originally *not* filed under the FTCA. Not one shred of related Congressional debate suggests consideration of a case originally brought against the federal government under the FTCA, yet it is for the latter purpose the Acting Solicitor General seeks to use the *Westfall* amendment.[13]

Indeed, the *Westfall* amendment incorporates a practical approach to these matters, not a hypertechnical one. Section 6(d)(5)(A) provides the claim shall be deemed timely presented if the date the underlying civil suit was *commenced* was such that "the claim would have been timely." Congress thereby recognized the practical effect of a civil suit filing [even in state court] against the person of a federal employee as tantamount to notifying

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[13] Moreover, section 6(d)(5) only speaks of "failure first to *present* a claim pursuant to section 2675(a)" 102 Stat. 4565, (emphasis added) not of failure to *exhaust* section 2675(a) procedures prior to filing suit. Of course Mr. McNeil both presented, and exhausted (by July 21, 1989).

the federal government for FTCA "jurisdictional" purposes.[14] Such recognition supports the view that Congress intended a practical, door-opening approach to claimants seeking to bring suits for tort actions involving federal employees; the claimant was to receive full benefit of timely, but incorrect, court filings, even if the wrong *party* was sued. Congressional history of the *Westfall* amendment contains absolutely no suggestion that suits originally brought against the federal government were considered at all. Contrast explicit Congressional consideration of the balance as discussed in *Hallstrom v. Tillamook County,* 493 U.S. 20, at 30 (1989).

Moreover, the word "commence" obviously and plainly refers to the date of filing the civil suit. Yet 2675(a) uses a different word: "instituted."

II. Commence and Institute are not Identical Terms: Examination of both Congressional and Presidential use of the Terms Demonstrates a Narrow – but Significant Difference

In the *Westfall* amendment, as well as many other instances, Congress uses these two words even in the same statutes in different senses. Congress normally appears to employ the word "commence" with a single point reference. However, "institute" is frequently used

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[14] If anything about section 2675 is "jurisdictional" it is the filing of the administrative claim – not the completion of the administrative process which can be infected by badly drafted agency letters. *See, Jerves v. United States,* 966 F.2d 517 (9th Cir. 1992) at 520 (which held a settlement offer of $15,000 on a $250,000 claim not a final denial letter) and cases cited, esp. *Dyniewicz v. United States,* 742 F.2d 484, 486 (9th Cir. 1984) (sum certain denial letter defective, failed to state must sue within 6 months of mailing).

in a manner that contemplates a multiplicity of beginning points or actions as well as in relationship to the carrying out of processes.

A. Some of the Examples Cited by The Acting Solicitor General Illustrate the Difference.

The Acting Solicitor General's brief at 19 cites 25 U.S.C. sec. 640d-17(c) as proof the terms are synonymous. The text actually illustrates the opposite. For example:

> "Either tribe may *institute* such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands . . . and to fully accomplish all objects and purposes of this subchapter. Such actions may be *commenced* in the District Court. . . . "

Commenced obviously relates to a single, and particular date of filing for each action; institute refers to the plural "actions" which may be one or more "further original, ancillary or supplementary actions."

Similarly, 19 U.S.C. section 1641(d)(4), also uses the words with different senses:

> "[N]o proceeding . . . shall be *commenced* unless such proceeding is *instituted* by the appropriate service of written notice . . . except that if the alleged violation consists of fraud, the 5-year period of limitation shall *commence* running from the time such alleged violation was discovered."

Both uses of commenced appear to refer to a single date, one refers to filing, the other to the date fraud is discovered; instituted refers to a process of service of written notice – a process that includes both actual serving and a return of service.

Similarly 19 U.S.C. section 1621 states:

> "No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be *instituted* unless such suit or action is *commenced* within five years. . . . "

When a single, particular, suit is referenced, it is "commenced;" when either of "suit" or "action" (or the process of litigation), the reference is "instituted."

Perhaps the best example is 29 U.S.C. Section 256 which states:

> "[A]n action shall be considered to be *commenced* on the date when the complaint is filed; except that in the case of a collective or class action *instituted* . . . it shall be considered to be *commenced* in the case of any individual claimant – (a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or (b) if such written consent was not so filed or if his name did not so appear – on the subsequent date on which such written consent is filed in the court . . . "

Section 256 clearly contemplates actions being "instituted" that have not yet "commenced" with respect to particular plaintiffs, and the "institution" may refer to a host of plaintiffs each of whose actions may *commence* on different dates. Both sections 256 and 1641(d)(4) require actions beyond (and subsequent to) the court filing before the action fully *commences*.

B. Presidential Messages to Congress Use the Word "Institute" to refer to a Process.

Each of Presidents Eisenhower, Johnson, and Carter transmitted Messages to Congress with the word institute employed to refer to processes, not a specific date of beginning.

> "[T]he Assistant Secretaries of Defense will provide the Secretary with a continuing review of the programs of the defense Establishment and help him *institute* major improvements in their execution." 5 USCA Reorg. Plan 6, 1953, Message of April 30, 1953.
>
> "Upon the taking effect of the reorganization plan, the National Science Foundation will *institute* such new arrangements, in lieu of the divisional committees now required by law, as it deems appropriate. Such new arrangements may include the establishment of committees. . . . " 5 U.S.C.A. Reorg. Plan 5, 1965, Message of May 27, 1965.
>
> "I am taking the following actions to: *Institute* for domestic and economic issues, a system similar to the Presidential Review Memorandum process currently used for National Security issues." 5 U.S.C.A. Reorg. Plan 1, 1977. Message of July 15, 1977. "[I]t [Congress] directed me in title III of the 1978 development assistance authorization act, to *institute* a strengthened system of coordination of U.S. economic policies affecting the developing countries. . . . " 5 U.S.C.A. Reorg. Plan 2, 1979, Message of April 10, 1979. (emphasis added in each case)

C. Congress Also Often Has Used "Institute" to Refer to Matters that Transcend a Single Point in Time: Such Uses are Consistent with Exhaustion After Court Filing

> "[T]he Secretary of Defense shall, upon recommendation of the Board of Regents, *institute* actions necessary to ensure the maximum number of first-year enrollments in the University. . . . " 10 U.S.C.A. sec. 2112(b) (last amended Dec. 12, 1980)
>
> "[T]he Board of Governors of the Federal Reserve System shall ascertain that the regulations prescribed by it are not being complied with, said board is authorized and empowered to *institute* an investigation of the matter and to send for persons and papers, subpoena witnesses, and administer oaths . . . " 12 U.S.C.A. sec. 603 (last amended 1935)
>
> "On becoming final, the Commission deficiency order may – (A) require the contract market to – (i) *institute* appropriate improvements in its trade monitoring system necessary to correct the deficiencies noted therein . . . " 7 U.S.C.A. Sec. 12e(b)(3) (enacted in 1922)
>
> "[T]he Federal Government should *institute* systems for determining pay of its General Schedule employees under which the linkage between their performance and their pay will be strengthened. . . . " Pub. L. 101-509, sec. 529(a)(1) (enacted 1990)

The point is not that "commence" and "institute" cannot mean the same thing, they can, but they often don't, and do not in the matter at hand.[13] In the case at bar, it is far more consistent with Congressional purpose in enacting the FTCA to construe institute *not* narrowly to refer to a single point in time, but to refer to the process

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[13] Indeed, Congress in many statutes has directed a federal agency "to request the Attorney General of the United States to *institute* a civil action. . . . " 16 U.S.C.A. sec. 3373(c); *See also,* 16 U.S.C.A. sec. 1540(a)(1) Such references obviously reference multiple points in time, at a minimum the decision of the Attorney General to sue, and the actual commencement by filing.

of litigation – which is consistent with the views of those circuits that permit suits to proceed so long as no substantial progress has occurred before the administrative process has been exhausted.

The Acting Solicitor General's argument amounts to a request this court construe Congress's action enacting one statutory section opening the doors of federal courts by permitting an additional 60 days for first *presenting* an administrative claim in an unrelated class of cases, to imply Congress's intent 22 years earlier was to close the courtroom doors by a different statutory section, 28 U.S.C. section 2675, a section neither quoted, nor discussed by the 1988 House Committee Report. The argument stretches credulity, and ignores both the text of the 1988 amendment as enacted, as well as the legislative history of that amendment.[14]

Both text and legislative history of the *Westfall* amendment reiterate the overall purpose of the FTCA of opening courtroom doors, not shutting them. Section 2 Findings and Purposes, (a)(2) stated: "The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees *in the same manner* in which the common law historically has recognized the responsibility of any

[14] "We have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress's clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act, *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951), *see, e.g. id.*, at 554-555, *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383 (1949)" *United States v. Nordic Village*, 112 S.Ct. 1011, 1014 (1992).

employer for torts committed by its employees within the scope of their employment."[15] (emphasis added)

III. Mr. McNeil's August 7, 1989 Letter Adequately Set Forth the Basis of His Suit: He Asked to "Properly Commence" the Litigation, and Thus Made a Proper Rule 15(d) Pleading Sufficient to Correct Any Prematurity in the Initial Filing and to Reinstitute the Action.

Mr. McNeil's letter of August 7, 1989 (Jt. App. 10) properly construed should be considered an adequate

[15] Pub. Law 100-694, 102 Stat. 4563, Nov. 18, 1988. (100th Congress). (emphasis added) *See also*, Pet. Brief, section I, B & C, pp. 15-25, esp. nn. 14, and 16, as well as Senate Report No. 1196, quoted at p. 14. The stated purpose was to protect Federal employees from personal liability, while providing persons injured with an appropriate remedy against the United States. Pub. Law 100-694, Sec. 2 (b), 102 Stat. 4564.

The legislative history contains no intimations of intended restrictions on rights of suitors, quite the contrary. Rep. Moorehead stated the measure "in no way . . . infringe(s) or diminish(es) any legal rights of the individual." Congressional Record, House, 100th Cong. 2nd Sess. H 4719, June 27, 1988. Rep. Frank described the bill as "a status quo ante bill" (Id.) that simply restores the situation prior to this court's *Westfall* decision. Not a member of the House or Senate expressed any other purpose; indeed the measure passed both houses with virtually no discussion and overwhelming legislative support. See, Senator Grassley's description of administration, public employee union, and bipartisan legislative support. Congressional Record, Senate, 100th Cong. 2nd Sess. S15214, October 7, 1988; *See also*, Congressional Record, House, 100th Cong. 2nd Sess. H 10678, October 20, 1988, and H 4804, June 28, 1988, and Congressional Record, Senate, 100th Cong. 2nd Sess. S 16375, October 14, 1988.

filing for either restarting or commencing a new complaint. (As Judge Ripple stated.)

The government contends that a Rule 15(d) pleading may never "commence" or "institute" an action. This position is inconsistent with the Federal Rules of Civil Procedure and this Court's decisions.

Rule 15(d) was amended in 1963 to add that supplemental pleadings may be accepted "even though the original pleading is defective in its statement of a claim for relief or defense." This sentence was added to resolve a conflict in the circuits which had developed *over the precise issue presented by this case* – whether a plaintiff who had filed a defective complaint which failed to state a cause of action could correct the defect by filing supplemental pleadings, without going through the formality of withdrawing the entire case and refiling it. Before 1963, the federal courts were divided on the issue of how to correct such defects when subsequent events made the cause of action ripe.

Some courts adhered to the notion that defective filings must be dismissed without prejudice,[16] other courts "felt that requiring plaintiff to go through the needless formality and expense of instituting a new action when events occurring after the original filing indicated he had a right to relief was inconsistent with the federal rules."[17] 6A Wright & Miller, *Federal Practice*

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[16] *See e.g. LaSalle Nat. Bank v. 222 East Chestnut St. Corp.*, 267 F.2d 247 (7th Cir.), cert. denied, 361 U.S. 836 (1959); *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703 (2nd Cir. 1949).

[17] *See, e.g. U.S. for Use of Atkins v. Reiten*, 313 F.2d 673 (9th Cir. 1963); *Camilla Cotton Oil Co. v. Spencer Kellogg & Sons, Inc.*, 257 F.2d 162, 167 (5th Cir. 1958); *U.S. v. Russell*, 241 F.2d 879 (1st Cir. 1957).

and Procedure. Sec. 1505 at 190 (2nd Ed. 1990). The 1963 amendment resolved this conflict by allowing courts to entertain the action. *Id.* at 190-191.

The 1963 Advisory Committee Notes leave no uncertainty as to the intention of the drafters:

> [S]ome cases, opposed by other cases and criticized by the commentators, have taken the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied. Thus plaintiffs have sometimes been needlessly remitted to the difficulties of commencing a new action even though the events occurring after the commencement of the original action have made clear the right to relief. (citations omitted)

Thus the 1963 amendment to Rule 15(d) was passed to eliminate the necessity of withdrawing a defective complaint and resubmitting another.

Since Rule 15(d) was amended, this Court has held that a supplemental complaint is sufficient to cure a complaint which was filed before the plaintiff had exhausted his administrative remedies, even where administrative filing was a non-waivable jurisdictional requirement. In *Mathews v. Diaz*, 426 U.S. 67, 75 (1976) the plaintiff had joined an action challenging the constitutionality of certain provisions of the Social Security Act, before he had properly exhausted (or even filed for) administrative remedies, as required by the statute. A unanimous court relied on Rule 15(d) and held that a

supplemental complaint[18] would be sufficient to cure the defect.

The government attempts to distinguish *Diaz* by arguing that exhaustion of administrative remedies is not a prerequisite to *filing* suit under the Social Security Act ("SSA"). Sol.Gen.Br. 16-17, n.10. This claim lacks merit. The clear language of section 405(g) states that a plaintiff may obtain review in a district court through an action "commenced within 60 days" after mailing of notice of a final decision by the secretary. Section 2675 is quite similar except for "instituted." However, on the interpretation of "instituted" suggested by the government, the structures are identical; any complaint filed before administrative remedies are exhausted under the SSA or FTCA is premature. Yet although the court in *Diaz* stated in unambiguous terms that filing of an application under the SSA is a "nonwaivable condition of jurisdiction" 426 U.S. at 75 (citing *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975)) the action was permitted.

Without analyzing the language, history, or case law behind Rule 15(d), the government states that, in every instance, it is the original complaint, not the Rule 15(d) supplemental complaint, which serves to commence the

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[18] In fact Espinosa never formally supplemented the complaint; it sufficed that he "promptly brought" the fact of his filing the administrative request to the attention of the district court. 426 U.S. 73. Surely the fact of exhaustion was comparably demonstrated in the instant record by the July 21, 1989 HHS denial letter, Jt. App. 12-13, and the passage of six months from the January 17, 1989 filing of a claim for damages. Jt. App. 11. *See also, Security Ins. Co. v. United States for Use of Haydis*, 338 F.2d 444 (9th Cir. 1964) (premature filing corrected by filing supplemental complaint under Rule 15(d)).

action. Sol.Gen.Br., p. 12, n.4. The logical flaw with the government's position is that the government cannot explain when a Rule 15(d) action is commenced. If such an action is not commenced on the filing of a premature or defective complaint, as surely it cannot be, the only possible interpretation is that it is commenced at the time the curative supplemental complaint is filed. In the present case the August 7th letter complied with all of the requirements of Rule 15(d), including identification of a sum certain, its denial (hence presentation and exhaustion), and a basic allegation of the nature of the complaint, Jt. App. 10.[19]

The fact that Mr. McNeil lacked legal training to characterize this filing as a Rule 15(d) supplemental complaint does not preclude this Court from construing it as one. In analyzing *pro se* filings, a court must begin with the proposition that the, "pro se document is to be liberally construed." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). *Pro se* pleadings "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). See also, *Hughes v. Rowe*, 449 U.S. 5, 10 (1980).[20]

---

[19] Alternatively, if the August letter was not a supplement to a prior defective complaint, the Court should find that the August 7th letter is a complaint which properly commenced the action. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) does not contradict petitioner's position, for that case simply held that mailing the right to sue letter received from the agency was not sufficient to serve as a complaint because it did not provide a short and clear statement of the claim for relief. Id. at 149, n.3.

[20] The seventh circuit majority refused to consider this question. Jt. App. 30. Judge Ripple, the only judge to consider the matter, in dissent points out that the August 7th letter *itself*,

IV. *Hallstrom v. Tillamook County* is Inapposite

The government's almost exclusive reliance on *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) is misplaced. Unlike the FTCA, which was enacted to give a cause of action to aggrieved individuals, the citizen provisions of RCRA do not allow individuals to recover damages.[21] Instead, the RCRA notice provisions, like those of other environmental statutes analyzed in *Hallstrom*, only allows citizens acting as "private attorney generals" to attempt to get the government to act against the polluter. The Congressional purpose of stimulating governmental entities to take the lead in enforcement efforts would be seriously disserved by eliminating the 60 day notice period. Public rights are critically at issue. Holding a private attorney general seeking to vindicate the public interest to a higher standard of conduct that an individual seeking primarily to vindicate that individual's own

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a pro se pleading, asks the court to properly commence the litigation in light of plaintiff's filing, Jt. App. 31. In the court of appeals Mr. McNeil raised the issue in Appellant's Brief (by counsel) p. 7, and the government responded in the Supplemental Government Brief 4 (sic 3)-5. Despite the majority's conclusion in the seventh circuit that the issue was not adequately raised, the government does not appear to pursue this argument in this Court and does not object to this Court's consideration of whether the August 7th letter was a proper and adequate Rule 15(d) supplemental complaint. Sol.Gen.Br. 7, n.3. *See, Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979) (state procedural default, suit held in abeyance until respondent complied with statutory notice mandate).

[21] Most of the environmental statutes considered in *Hallstrom* authorize other types of remedies. See, 42 U.S.C. sec. 6972(a) (injunction, clean up orders, criminal or civil penalties). Attorneys fees and costs are also potentially recoverable. 42 U.S.C. sec. 6972(e).

rights makes practical and policy sense. Conversely, deprivation of an individual's right to sue because of a technical, non-substantive mistake in filing makes no sense, particularly when that individual has the unilateral right to reject any offer the federal government might make during the six month period. Additional administrative costs of taking extra steps to assert a cause of action pale by comparison with a rule that extinguishes that cause of action. *Cf. Chevron Oil Co. v. Huson*, 404 U.S. 97, 108 (1971).

Petitioner does not dispute any of the purposes discussed by the government brief at 19-21.[22] However, Petitioner accomplished each such purpose long before any actual judicial action on his case – the agency refused to make any settlement offer, but had an opportunity to investigate. Moreover, Petitioner not only thought his initial claim had been rejected, but gave the agency a second chance in July to settle, an opportunity the agency declined to employ.[23]

Neither plaintiffs who are unaware of procedural requirements nor plaintiffs who in good faith believe they have complied with procedural requirements can possibly be deterred by such requirements from filing suits. In

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[22] Petitioner does contest the characterization at Sol.Gen.Br. p. 22 that 2675(a) *requires* by clear terms presentment of an administrative claim *prior* to filing suit. Rarely do *clear terms* generate conflicts in the circuits for this court's resolution. None of "filed suit," "requires," "prior," or "presentment" appears in section 2675(a).

[23] The government suggests doubt about the complete destruction of Mr. McNeil's cause of action at Sol.Gen.Br. 24-25. The court of appeal's decision is unambiguous. "It is too late to file another [complaint]." Jt. App. 27.

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the end any interest in judicial economy supported by the rule advanced by the government is ephemeral; the government's rule will only promote additional labor for the judicial system for actions that can be refiled, and achieve but one economy in other cases. The treasury will be protected, both against meritorious and nonmeritorious claimants – by a rule which has nothing to do with the merits of their claims. This court should not command such a harsh result, for neither expressed congressional text nor policy commands such results for FTCA actions. The government requests a special tort claims defense for it alone, such claims were rejected by Congress in 1949 (Pet. Br. 26, 31-2); that rejection should stand.

CONCLUSION

Mr. McNeil obviously "honored" the Congressional demand of an administrative filing (Sol.Gen.Br. p. 9); indeed, he twice honored it, and informed each court below, the district court and the court of appeals (repeatedly) that he had honored it. Mr. McNeil deserves better than Ralph Ellison's, *Invisible Man* "invisible, understand, simply because people refuse to [hear] me. . . . It is . . . often . . . wearing on the nerves . . . you doubt if you really exist." *In re Carlos P.*, 78 Misc.2d 851, 358 N.Y.S.2d 608, 609 (N.Y. Fam. Ct. 1974). His case should be heard so that the extremely serious allegations he raises can be decided on the merits.

Respectfully submitted,

ALLEN E. SHOENBERGER
Court Appointed Attorney
for the Petitioner

APPENDIX A

Mr. McNeil's Initial Pro Se Brief in the seventh circuit stated:

"Before this action was filed, the government was properly served in writing to the appropriate federal agency within the two years after such claim accrues. Chief Counsel, Thomas Scarlett from the office of the Secretary, Department of Health & Human Services, replied to my administrative claim, on January 24, 1989, the claim was forward (sic) to PHS claim office and the claim was assigned to Public Health Services Royce Rich as claim officer's (sic), to investigate and put value on said claim.

However, on February 9, 1989 the Information officer's (sic) one Ms. Nancy Oleksa forward (sic) her finding to both Royce Rich the claim officer's (sic) of PHS and plaintiff McNeil which clearly states, that no such experiment were (sic) being conducted . . . Therefore, in accordingly with Cheif (sic) Counsel, Thomas Scarlett letter of January 24, 1989 plaintiff McNeil had been given permission to file his lawsuit since all concern (sic) parties are fully aware that, fraudulent concealment of information from ('the government') is no grounds for tolling a claim.

On March 6, 1989 plaintiff McNeil filed his complaint with attached documents concerning his permission to suit (sic), however, plaintiff was not allowed to process until April 20, 1990. Plaintiff (sic) motion for leave to file in forma pauperis was denied as moot since plaintiff paid the filing fee May 9, 1989. The defendant was served accordingly." (pp. 1-2)

"All concern (sic) parties fully agree that before one may file suit under Federal Tort Claims Act, one must present written notice of claim to the implicated agency in order that there might be meaningful opportunity to resolve matter without necessity of judicial intervention, which is clearly what was done in the case at bar." (p. 3)

"The government was properly served in writing to the appropriate federal agency on January 17, 1989." (p. 6)

"Clearly McNeil's administrative claim was timely and properly filed to the right agency, before the filing of McNeil (sic) Federal Tort Claims Act (sic), in the district court." (p. 6)

"On May 9, 1989 plaintiff McNeil paid his filing fee with a check the sum of $120.00, and the check was stamped paid May 18, 1989. To the clerk of said district court, however the clerk docket sheet reflect (sic) that the check was recieved (sic) April 15, 1990, this is clearly an error. (see exhibit 1-C attached copy of said check)." (p. 7)

"Sometime in late June of 1989, plaintiff McNeil was send (sic) a form #95 to be fill (sic) out and sent back to Mr. Timothy M. White, Chief Litigation Branch Business and Administrative Law Division. Now remember February 9, 1989 McNeil received (sic) a letter from Ms. Nancy Oleksa the office of Health Affairs, no such project exist. (sic) (see Exhibit 1-D letter dated July 21, 1989, from Timothy M. White,) this is the second denial of my claim within a seven (7) months, had plaintiff waited his first denial of six (6) months would have ran (sic) the limitation period. That is what you call damn (sic) if you do and damn (sic) if you don't." (p. 7)

The pro se reply brief filed in the seventh circuit stated:

"On January 17, 1989 plaintiff filed his administrative claim which provided sufficient information to enable all concern (sic) parties to properly address and put value on the claim attached to the administrative claim was a second FOIA request the first filed November 16, 1988.

On January 24, 1989 plaintiff receive (sic) a letter of acknowledgement from Mr. Thomas Scarlett, Chief Counsel with a filed (sic) number, F 88-35196 which stated as follows:

Re: F 88-35196
Mr. McNeil

I am sending your January 17, letter requesting damages to Arthur Simon, the PHS claims officer. It will be treated as an administrative claim. *If it is denied, you will have to file a lawsuit.*

This letter clearly gave plaintiff permission to file suit, if his claim is denied. Also in the CC. their (sic) is an acknowledgement of my second FOIA request.

CC: Arthur Simon (w/enclosure)
HFI-35 (Deighton; See FOIA letter)

. . . .

Exhibit (b) the February 9, 1989 letter was a written notice that no such project exist. . . . Clearly that was a final decision of the claim." (p. 2-3)

"Plaintiff McNeil has written documents which cearly (sic) establish that plaintiff filed his administrative claim on January 17, 1989, letter of acknowlegement from Mr. Thomas Scarlett Chief Counsel, the same letter also

stated that if the claim is denied, you will have to file a lawsuit, the letter dated January 24, 1989." (p. 5)

"Plaintiff originally commenced his action by filing his administrative claim to the Department of Health and Human Services on January 17, 1989." (p. 6)

"Plaintiff paid his filing fee May 9, 1989, the check was made out to the court clerk and mailed with case number. The sum of 120.00, it was return (sic) to the bank May 18, 1989 as cashed." (p. 6)

"Also Ms. Nancy Oleksa states, she has no other person to check with, that there are no files on this project, this was a final denial of plaintiff's claim.

. . . .

. . . .

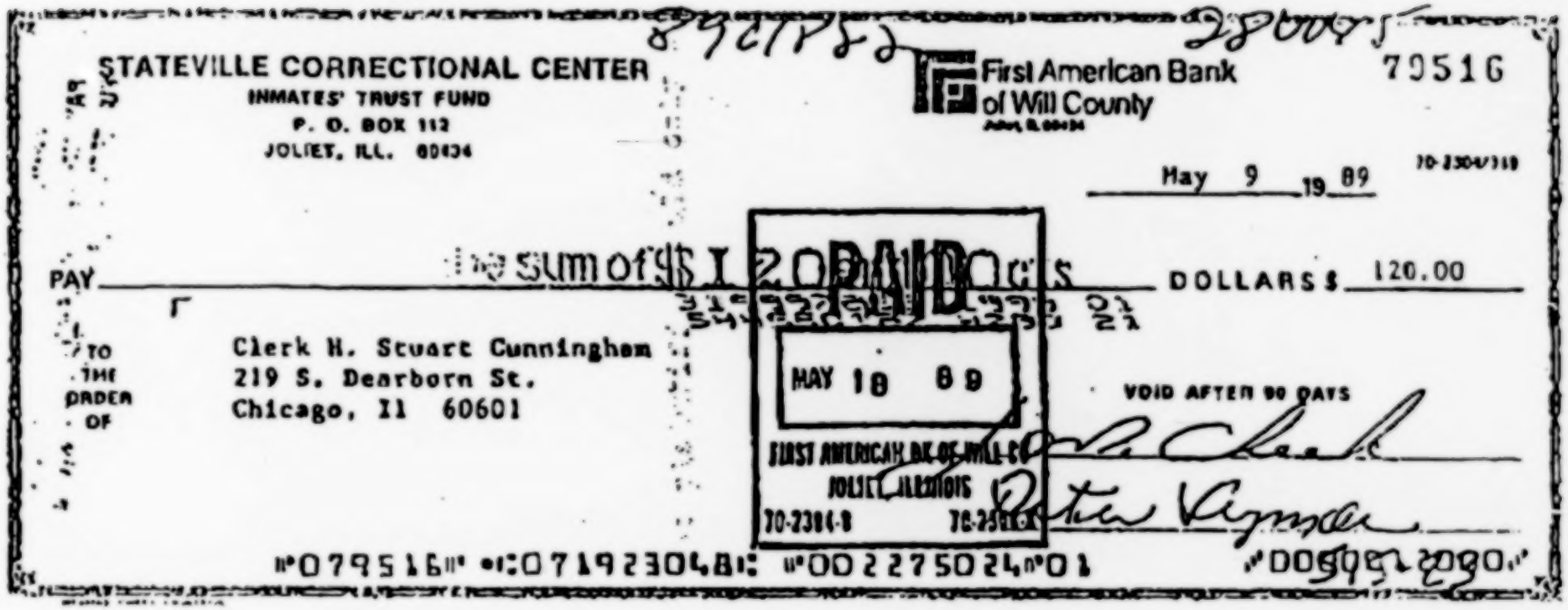
The only issue for review is subject matter jurisdiction which has not been properly address (sic) concerning the three (3) exhibits.

1. The January 24, 1989 letter which acknowledge plaintiff administrative claim date as January 17, 1989.

2. The reply letter from Ms. Nance Oleksa of February 9, 1989 and comments (sic) a final decision on the claim.

3. The January 24, 1989 letter which gave plaintiff permission to file his lawsuit." (p. 8)

APPENDIX B


STATEVILLE CORRECTIONAL CENTER
INMATES' TRUST FUND
P. O. BOX 112
JOLIET, ILL. 60434

First American Bank of Will County

79516

May 9 19 89

PAY Sum of $120 and 00 cts DOLLARS $ 120.00

TO THE ORDER OF
Clerk H. Stuart Cunningham
219 S. Dearborn St.
Chicago, Il 60601

PAID
MAY 18 89
FIRST AMERICAN BK OF WILL CO
JOLIET, ILLINOIS

VOID AFTER 90 DAYS

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 92-6033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM McNEIL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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No. 92-6033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM McNEIL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C. IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Trial Lawyers for Public Justice, P.C. ("TLPJ"), is a national public interest law firm devoted to using the legal system to remedy and correct corporate and government misconduct. Supported by and working through a nationwide network of over 1300 of the country's outstanding trial lawyers, TLPJ brings precedent-setting and socially significant cases designed to advance civil rights and civil liberties, consumer and victims' rights, environmental protection and safety, occupational health and employee rights, and the protection of the poor and the powerless.

For years, the confusing requirements of the Federal Tort Claims Act have stymied the efforts of both represented and unrepresented citizens to obtain legal review of the substance of their claims. This case is a perfect example of that problem. TLPJ is particularly interested in this case because the decision below unfairly precludes an untutored lay person, who alleges serious injury, from obtaining his day in court.

SUMMARY OF ARGUMENT

By enacting the Federal Tort Claims Act (hereafter "FTCA"), Congress has provided a vehicle through which injured persons may pursue civil claims against their Federal Government. 28 U.S.C. §2401 *et seq*. The FTCA, however, contains confusing procedural mechanisms that, if not properly construed, may unfairly block both represented and unrepresented persons from having their day in court.

Petitioner is a prisoner, unlearned in the law, who has a claim of serious injury under the FTCA. Unable to afford counsel, petitioner instituted suit on his own behalf. Involuntarily, petitioner remained without counsel. Despite petitioner's repeated attempts at compliance with FTCA procedural requirements and repeated requests for appointment of counsel, petitioner was never appointed counsel and his case was dismissed for failure to comply with FTCA procedural requirements. At the time of the court's dismissal of the case, Petitioner had fully complied with all FTCA procedural requirements.

The district court refused to apply a common-sense construction of FTCA procedural requirements, ignored the gross inequities of this case, and improperly dismissed

petitioner's claim. Rigidly construing the FTCA procedural requirements, the Seventh Circuit affirmed. *McNeil v. United States*, 964 F.2d 647 (1992). This rigid construction requires prematurely filed FTCA cases to be dismissed even when the defect is cured. This hypertechnical construction of FTCA procedural requirements will forever bar petitioner from adjudicating his claim on the merits in federal court, without this Court's intervention.

Under the Seventh Circuit's holding, if prematurely filed FTCA suits with cured defects are dismissed and the claimant is still able to refile, the claimant must add another layer of paper to the case file, aggravating court congestion. Alternatively, if the FTCA claimant is unable to refile because the claim is time-barred, the claimant will be denied his or her day in court. Neither of these outcomes serve any legitimate purpose. Moreover, FTCA procedural requirements were established to afford the affected federal agency an opportunity to settle before time-consuming and expensive litigation progresses in federal court. Clearly, the mere filing a claim in federal court, without further substantive action, poses no threat to the agency's opportunity or ability to settle at an early stage.

The Seventh Circuit's hypertechnical construction of FTCA procedural requirements is unfair, unnecessary and at odds with Congressional intent to give claimants their day in court and to make FTCA litigation more like ordinary civil litigation.

ARGUMENT

I.

THE PROCEDURAL REQUIREMENTS OF THE FTCA SHOULD NOT BE GIVEN A HYPERTECHNICAL CONSTRUCTION BY THE COURTS; RATHER, A COMMON-SENSE CONSTRUCTION IS REQUIRED.

For years, the confusing procedural requirements of the FTCA have frustrated the efforts of injured persons, both represented and unrepresented, who seek legal review of the substance of their claims. The complexity of these procedural rules supports a practical, common-sense approach to construing these procedural prerequisites. A common-sense construction allows a prematurely filed FTCA action to proceed so long as no substantial progress has taken place in court before the agency has denied the claim and before the court entertains the United States' motion for dismissal. A hypertechnical construction, such as that applied by the Seventh Circuit in this case, only serves to undermine the purpose of the FTCA and unduly limits the injured person's access to the courts. In the *pro se* litigant's case, an overly rigid construction also serves to unduly limit the party's right to self-representation.

A. THE COMPLEX NATURE OF FTCA PROCEDURAL REQUIREMENTS SUPPORTS A COMMON-SENSE APPROACH IN INTERPRETING FTCA PROCEDURAL REQUIREMENTS.

The FTCA is replete with confusing procedural requirements. *See, e.g.* 28 U.S.C. §§ 2401(b), 2675(a) (1982 ed.). Indeed, the number of failed claims which result from improper compliance with FTCA criteria is staggering. Zillman, *Presenting a Claim Under the Federal Tort Claims Act*, 43 La. L. Rev. 961, 962 (1983).[1] In essence, claims that are entitled to be heard on the merits are being suppressed because of an overly rigid construction of FTCA procedural requirements.

In many cases, an FTCA litigant will file a complaint in federal court before receiving an official administrative denial of the claim by the federal administrative agency named in the complaint, but will not attempt to take substantive action on the case until after the denial is received. Even where the plaintiff has already received the denial, the United States typically asks the court to dismiss the claim, on the ground that the plaintiff failed to wait for the official administrative denial of the claim before filing the suit. Under the Seventh Circuit's holding in this case, the claim may be dismissed, even where the plaintiff takes no measures to advance the filed lawsuit until after receipt of the administrative denial.[2]

In contrast, the United States Courts of Appeals for the Third and the Eighth Circuits have recognized the

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[1] Zillman's article does not distinguish between those citizens proceeding pro se and those represented by counsel who get caught in FTCA procedural traps. From the existing case law, one can surmise that the reported failures include both *pro se* cases and regular cases where litigants have retained legal counsel. From this, it becomes strikingly apparent that even legal practitioners are being caught in the procedural complexities of the FTCA. *See, e.g., Kubrick v. United States*, 581 F.2d 1092 (3rd Cir. 1978), *rev'd on other grounds*, 444 U.S. 111 (1979).

[2] Because the main briefs will likely discuss the different meanings of "institute" and "commence" under the FTCA, we will not address this issue. In our view, however, petitioner may have "instituted" the FTCA lawsuit in March of 1989 by filing a complaint, but did not attempt to "commence" the FTCA lawsuit by taking substantive action on the case until after he had received the administrative denial and filed it with the court.

complexity of the FTCA's claim presentation and limitations requirements and have properly applied a common-sense construction to those requirements, as in ordinary civil litigation. *See, Kubrick v. United States, supra*; *Celestine v. Veterans Administration*, 746 F.2d 1360 (8th Cir. 1984). *See also, Abernathy v. United States*, 732 F. Supp. 98 (D. Kan. 1990) (adopting the *Celestine* position). The Third and the Eighth Circuits have held that, if an FTCA claimant files a complaint before the administrative agency denies the FTCA claim and the claimant refrains from substantive action on the case, the FTCA claimant need not refile the complaint when the administrative denial is eventually received. *Kubrick*, 581 F.2d at 1098; *Celestine*, 746 F.2d at 1363. These courts recognized that a hypertechnical construction of the FTCA procedural requirement is unnecessary, and that, because of the procedural complexity of the FTCA, a practical common-sense construction is required.

A conflicting line of cases, including the instant case, mandate refiling if a case has been filed before administrative denial of the claim. *See, United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1306-07 (5th Cir. 1987); *Gregory v. Mitchell*, 634 F.2d 199, 204 (5th Cir. 1981).[3] This rigid construction of the FTCA is obviously impractical since it only serves to duplicate filings and aggravate court congestion. *Campbell v. United States*, 534 F.Supp. 762, 764 (D. Hawaii 1982). *See also, Kubrick*, 581 F.2d at 1098; *Celestine*, 746 F.2d at 1363. It is wasteful and needless formalism to require the claimant to refile the same complaint with the court.

[3] Because it is likely that the parties will fully discuss the contours of the law on this issue, this brief will not reiterate the current state of the law, but rather, will explain why the FTCA should be interpreted to permit plaintiff to proceed.

Moreover, a hypertechnical construction of the FTCA serves no legitimate purpose. FTCA procedural requirements were established to afford the affected administrative agency an opportunity to settle before time-consuming and expensive litigation progresses in federal court. S. Rep. No. 1327, 89th Cong., 2nd Sess. 2 (1966). Clearly, the mere filing of a claim in federal court, without further substantive action, poses no threat to the agency's opportunity or ability to settle at an early stage. On the other hand, the rigid approach of the Seventh Circuit has the negative effect of failing to safeguard the claimant's interest in instituting suit to preserve the claim. Accordingly, a strained construction of the FTCA is inconsistent with the purpose of the FTCA and its procedural requirements.

B. A COMMON-SENSE CONSTRUCTION OF FTCA PROCEDURE COMPORTS WITH THIS COURT'S TREATMENT OF *PRO SE* LITIGANTS.

The ability of citizens to represent themselves in legal proceedings dates back to the Judiciary Act of 1789. 1 Stat. 73, 92 (1789). Courts have construed the Sixth Amendment to incorporate the right of self-representation, *United States v. Plattner*, 330 F.2d 271, 273-74 (2nd Cir. 1964), and this Court has reaffirmed that right, *Faretta v. California*, 422 U.S. 806, 819 (1975). Central to the right of self-representation is the opportunity to communicate the facts and the legal issues of a case. Since our adversarial system relies upon the existence of knowledgeable practitioners on both sides of the controversy who focus, develop, and introduce all relevant facts and legal arguments to the courts, it carries the risk of unfairly disadvantaging *pro se* litigants who lack legal expertise and who may be unable to effectively assert their

legal rights. When this happens, the historical right to proceed *pro se* becomes empty.

Virtually all *pro se* litigants labor under the handicap of not being able to read procedural rules as effectively as sophisticated professionals versed in the law. McLaughlin, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 Fordham L. Rev. 1109, 1118 (1987). Recognizing their handicap, this Court has guaranteed *pro se* litigants the right to have courts liberally construe their pleadings. *Haines v. Kerner*, 404 U.S. 519 (1972), *reh'g denied*, 405 U.S. 948 (1972). *See also*, *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), *reh'g denied*, 429 U.S. 1066 (1977). Significantly, this Court already has recognized the plight of the *pro se* litigant under the FTCA, "a likely trap for the inexperienced and unwary inmate, ordinarily indigent and unrepresented by counsel, with a substantial claim." *McCarthy v. Madigan*, ___ U.S. ___, 112 S.Ct. 1081, 1090 (1992). Consistent with the experience of other *pro se* litigants, petitioner was confused by the FTCA procedural prerequisites, notified the court of this confusion, and requested counsel. J.A. at 10. Under these circumstances, a fair-minded construction of procedural rules is required.

The Seventh Circuit's rigid construction of FTCA procedural rules may stem from a concern, expressed by this court in the *Faretta* case, that petitioner was trying to avoid his responsibility of procedural compliance and was exploiting his status as a *pro se* litigant. *See*, *Faretta v. California*, 422 U.S. at 835, n.46. It is important to remember, however, that in this case, petitioner became a *pro se* litigant not as a matter of choice, but rather as a matter of necessity.

Similarly, a concern that *pro se* litigation clogs the courts can not justify the extremely narrow construction of the FTCA adopted by the Seventh Circuit. Even though the number of meritorious *pro se* complaints may be minimal, it is vital that these complaints be recognized. Bradlow, *Procedural Due Process of Pro Se Civil Litigants*, 55 U. Chi. L. Rev. 659, 678 (1988). Because all litigants should have their day in court, the interest in entertaining substantive suits should outweigh any interest in reducing the number of spurious suits that might result if courts did not liberally construe the *pro se* litigant's pleadings. *Id.*

The fair-minded, common-sense approach typically afforded *pro se* litigants in other legal areas should be used when construing FTCA procedural rules. Severe, unfair consequences, including loss of access to the courts, result when courts give an unnecessarily rigid construction to the FTCA. A common sense construction is needed to safeguard *pro se* litigants from forfeiting their rights because of their ignorance of procedural rule construction.

C. THE INHERENT INJUSTICE OF BARRING PETITIONER'S CLAIM REQUIRES THE EQUITABLE TOLLING OF ANY ARGUABLE FTCA DEADLINE.

The difficulty petitioner experienced in trying to institute suit adds to the injustice which petitioner experienced when the lower court barred his claim and deprived him of his day in court. The injustice of barring petitioner's claim, under the circumstance of this case, requires the equitable tolling of any arguably applicable FTCA deadline.

Petitioner involuntarily remained without counsel during the period of time in which the United States claims

he forfeited his right to sue. Immediately after the administrative denial of petitioner's claim, petitioner filed a motion for appointment of counsel. J.A. at 10. The district court held petitioner's motion for appointment of counsel in abeyance for over a year before the court finally denied counsel. J.A. at 1, 2. During the one-year interim, petitioner repeatedly attempted to ensure that he had fully complied with FTCA procedure. Petitioner notified the court of his confusion over the procedural rules and his lack of legal resources in his state correctional facility. J.A. 10. The court's inaction in waiting a year to rule on a crucial motion for appointment of counsel—and then dismissing his case on the basis of an extremely narrow interpretation of the FTCA—is grossly unfair and should not be countenanced by this court.

The United States' conduct in this case also contributes to the gross unfairness petitioner faced when attempting to file and to preserve his claim. The United States, whatever its motive, waited until approximately 18 months after petitioner had included a copy of the agency sum certain denial in his filings and after the limitations period had run before filing its motion to dismiss petitioner's complaint. In the interim, the United States filed an answer which admitted many of plaintiff's allegations. The United States' filing of an answer, instead of a motion to dismiss, lulled petitioner into a false sense of security that he had complied with the procedural prerequisites.[4]

[4] Technically, the United States should have moved to dismiss in lieu of an answer. Either the United States was ignorant of Rule 12(b) which requires every defense to be asserted in responsive pleading or by a motion to dismiss or it deliberately took advantage of an indigent, imprisoned citizen. In either event, had the United States followed the rules, petitioner would have been alerted to any alleged procedural defects.

Despite his best efforts, petitioner was prevented from learning of the specifics of his procedural defects until after it was too late. The timing of the United States' motion left no time for petitioner to preserve his claim. In conjunction with the lower court's interpretation of the FTCA, the United States' conduct worked to deny petitioner his day in court.

The Seventh Circuit's decision relies heavily on *Hallstrom v. Tillamook County*, 493 U.S. 20, *reh'g denied*, 493 U.S. 1037 (1990). In *Hallstrom*, however, this Court noted that the dismissal of the action would not have the "inequitable result of depriving petitioners of their right to a day in court" *Id.* at 32. Unlike the *Hallstrom* petitioner, this petitioner *has been* deprived of his day in court.

Through much difficulty and without guidance, petitioner attempted to institute and preserve his claim. Particularly, in light of the inequities petitioner faced, the Seventh Circuit's rigid analysis of FTCA procedural rules is wholly inappropriate. Congress did not intend for the FTCA to be interpreted so rigidly.

Moreover, the injustice of barring petitioner's claim requires the equitable tolling of any arguable FTCA deadline. The statute of limitations in suits against the government are subject to equitable tolling. *Irwin v. Veterans Administration*, 498 U.S. 89 (1990), *reh'g denied*, 111 S.Ct. 805 (1990). In *Schmidt v. United States*, 933 F.2d 639 (8th Cir. 1991), the Eighth Circuit specifically applied *Irwin* in an FTCA context after remand from this Court for consideration of that specific issue and found that the FTCA deadline can be equitably tolled. *Id.* at 640. The inequities that petitioner faced in this case require any arguably applicable FTCA deadline to be equitably tolled here.

II.

A HYPERTECHNICAL CONSTRUCTION OF FTCA PROCEDURAL REQUIREMENTS CLASHES WITH CONGRESS' EXPRESS POLICY TO BROADEN THE SCOPE OF THE FTCA TO MAKE IT MORE LIKE ORDINARY CIVIL LITIGATION.

While the FTCA certainly does not serve as a "carte-blanche" for injured citizens to litigate their claims against the federal government, it does symbolize Congress' resolve to enhance the ability of citizens to hold federal agencies accountable for their conduct. Subsequent amendments have broadened the litigation base of those citizens able to sue under the FTCA. These amendments evince Congress's conscious intent to make suing the federal government more like suing an ordinary defendant. They also undercut the decision below, which construes the FTCA so rigidly that access to the courts is significantly curtailed.

Congress enacted the FTCA in 1946. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (Aug. 2, 1946). At that time, the ability to litigate only applied to claimants whose claims accrued after January 1, 1945 and whose claims were filed within one year after the date the claim accrued (or within one year of the date of enactment). In 1949, however, Congress amended the FTCA in two ways. *See* Act of Apr. 25, 1949, Pub. L. No. 55, 63 Stat. 62 (1949). First, it broadened the limitations period in Section 2401(b) from one to two years. Second, it placed a January 25, 1945 date-back provision into the statute so that the amendment renewed all otherwise

expired claims accruing on or after January 1, 1945. H.R. Rep. No. 276, 81st Cong., 1st Sess. 1 (1949).[5]

By expanding the time to institute suit from one to two years, Congress made FTCA litigation more like ordinary civil litigation. *See* H.R. Rep. No. 276, 81st Cong., 1st Sess. 1 (1949). Explaining the proposed changes, a congressional committee declared, "The committee feels that, in comparison to analogous State and Federal statutes of limitation, the existing one-year period is too short and tends toward injustice in many instances. *Id.* at 3-4. "It is not the intention of the Federal Government to deprive tort claimants of their day in court or of their remedies. . ." *Id.* at 5.

These amendments and the accompanying committee report convey Congress's intent that FTCA suits should be comparable to civil suits against ordinary defendants and should not be afforded special treatment merely because the federal government is a party to the suit. Similarly, the procedural requirements of the FTCA should not be awarded a special, hypertechnical construction by the courts merely because the United States is the defendant; rather, a practical, common-sense construction is necessary as in ordinary civil litigation.

The Seventh Circuit's decision construes the FTCA procedural requirements so rigidly that it thwarts Congress' express intent to give claimants their day in court. A sound, practical approach to FTCA procedure is necessary to carry out Congressional intent.

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[5] Amendments to the FTCA occurred in 1966 and required that FTCA claimants present a claim to the affected administrative agency prior to filing. S. Rep. No. 1327, 89th Cong., 2nd Sess. 2 (1966). However, for purposes of this case, since 1966 the FTCA has remained in substantially the same form.

III.

THE INAPPROPRIATE DISMISSAL OF PETITIONER'S CLAIM DISSERVES THE PUBLIC INTEREST AND RENDERS THE PURPOSE AND EFFECT OF THE FTCA MEANINGLESS.

The dismissal of petitioner's claim was inappropriate and affronts the public interest. Specifically, the district court's dismissal of petitioner's claim and the Seventh Circuit Court of Appeals' affirmation of that decision is tantamount to a withdrawal of meaningful access to the courts and a nullification of an injured person's ability to bring claims under the FTCA.

It is well-established that meaningful access to the courts for all individuals is a fundamental constitutional right. *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Johnson v. Avery*, 393 U.S. 483, 485 (1969). Moreover, this Court repeatedly has held that *pro se* litigants are entitled to meaningful access to the courts. *See*, *Bounds*, 430 U.S. at 828; *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); *Ross v. Moffitt*, 417 U.S. 600, 612-15 (1974). The lower courts' hypertechnical analysis of FTCA procedural requirements is unwarranted and dissipates the petitioner's right of access to the court by forever precluding a disposition on the merits. In effect, because petitioner is not educated in the law and cannot wade through a complicated morass of legal procedure, petitioner's substantive FTCA claim will never be addressed by a court. A fair-minded, ordinary construction of the FTCA is needed to ensure that individuals such as petitioner are not unnecessarily being deprived of their day in court.

Accordingly, the lower courts should have given a commonsense construction of FTCA procedural requirements which Congress undoubtedly had envisioned. Such a construction

not only is expected but also safeguards petitioner's interests and society's interests in continuing the right of all citizens to bring civil claims under the FTCA, to represent themselves in a court of law, and to secure meaningful access to the courts.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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